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Environmental Critique of Adverse Possession

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AN ENVIRONMENTAL CRITIQUE OF ADVERSE POSSESSION

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INTRODUCTION

Consider three applications of modern adverse possession law to wild, undeveloped land. *A*, the owner of 260 acres of wild forest land, loses title to a claimant who hunts on the land and sometimes cuts a few trees.[1] *B*, the owner of a large gravel bar, loses title to a claimant who occasionally fishes on the land and removes sand and gravel.[2] *C*, the owner of sixty-three acres of unfenced natural grassland, loses title to claimants who sometimes graze sheep and cattle on the property.[3] What justifies these results?

Conventional legal wisdom explains adverse possession as the product of a statute of limitations governing actions to recover possession of real property. Under this "limitations model," a person who continuously occupies land in an open, notorious and hostile manner gives the owner constructive notice of an adverse title claim; the dilatory owner loses his right to sue in ejectment, regardless of the merits of the occupant's claim. Adverse possession under this model serves the neutral policies of preventing stale claims and allowing repose. From the environmental standpoint, the limitations model appears relatively benign.

This image of adverse possession, however, is more mirage than reality. The doctrine is instead dominated by a prodevelopment nineteenth century ideology that encourages and legitimates economic exploitation—and thus environmental degradation—of wild lands. This "development model" is fundamentally antagonistic to the twentieth century concern for preservation. The three case examples above, and hundreds of other modern adverse possession decisions, are best explained by the development model, and not the constructive notice fiction upon which the limitations model relies.

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1 Goff v. Shultis, 257 N.E.2d 882, 885 (N.Y. Ct. App. 1970).

2 Kroulik v. Knuppel, 634 P.2d 1027, 1029 (Colo. Ct. App. 1981).

3 Quarles v. Arcega, 841 P.2d 550, 561 (N.M. Ct. App. 1992).

Adverse possession can no longer be ignored as a dusty, obscure relic. Efforts to preserve wild land through private ownership have accelerated in the past twenty years. Conservation organizations, land trusts and other environmentally concerned owners embracing the market approach to preservation have acquired legal rights to millions of acres of forests, wetlands, grasslands, deserts and other natural lands. Together, these lands constitute an area larger than the states of Massachusetts, Connecticut and Rhode Island combined. Adverse possession threatens the integrity and existence of these private sanctuaries.

This Article explores the relationship between adverse possession and environmental preservation. Part I examines the anti-environmental foundation of the adverse possession doctrine, concluding that the limitations model is largely irrelevant in the wild lands context. In the United States, traditional adverse possession law was remolded by an instrumentalist judiciary in the nineteenth century to serve the goal of national economic development. The threshold for adverse possession was reduced to the point where sporadic, inconspicuous activities sufficed to create title. Under this development model, it became far easier to adversely possess wild land than developed land. The strand of modern adverse possession law applicable to wild lands continues to be governed by this antiquated model.

Part II explains how adverse possession imperils private land preserves. The structure of adverse possession doctrine encourages both the owner and the adverse claimant to develop wild lands, and thus to despoil them, in the interest of either retaining or obtaining title. Furthermore, adverse possession tends to transfer title from the preservationist owner to the exploitative claimant.

Part III proposes an environmental reform of adverse possession. Under this proposal, wild lands would be exempt from adverse possession law. Contemporary concern for environmental protection, which is founded on both moral and utilitarian bases and buttressed by a traditional concern for owner autonomy, justifies such reform. Potential objections to the proposal based on land use efficiency, litigation avoidance, prevention of adjudicatory error due to stale evidence and repose for the adverse possessor are outweighed by the benefits of reform.

I
THE ANTI-ENVIRONMENTAL FOUNDATION OF ADVERSE POSSESSION

American legal theory explains adverse possession as a specialized application of the statute of limitations.[4] With the passage of time, a suit by the dispossessed landowner to eject the adverse claimant is barred.[5] Treatises,[6] law review articles[7] and judicial opin-

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4 *See* R. H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 331 (1983) (concluding that the test for adverse possession according to the "dominant view among commentators" is whether the adverse claimant has "so acted on the land in question as to give the record owner a cause of action in ejectment against him for the period defined by the statute of limitations"); *see also* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 n.7 (1986) (citing numerous sources for the proposition that the "generally accepted views" on adverse possession include the belief that adverse possession turns on whether a cause of action has accrued against the adverse claimant and in favor of the true owner based on possession that continued for the statutory period).

5 Under a pure limitations model, of course, the adverse possessor would not receive title. A statute of limitations, in theory, bars only the remedy but does not extinguish the right. A common example is an action to collect a debt. Once the limitations period expires, the action is barred, but the creditor's right to collect, by offset or otherwise, is not. In contrast, the successful adverse possessor, whether occupying wild land or developed land, acquires legally-recoguized title. Thus, the true owner who has lost an adverse possession lawsuit cannot reclaim his rights merely by reentering the land during the successful claimant's absence. In this sense, adverse possession bars both the remedy and extinguishes the right. *See* Marathon Petroleum Co. v. Colonial Motel Properties, Inc., 550 N.E.2d 778 (Ind. Ct. App. 1990); *see also* 7 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 1017 at 91-109 to 91-110 (16th ed. 1993) [hereinafter POWELL] (discussing the anomaly that adverse possession bars the right as well as the remedy); CHARLES C. CALLAHAN, ADVERSE POSSESSION 53-59 (1961) (same).

6 *See* 3 AMERICAN LAW OF PROPERTY §§ 15.1, 15.2 at 755 (A. James Casner ed., 1954) ("The sole historical basis of title by adverse possession is the development of statutes of limitations on actions for the recovery of land in England."); 7 POWELL, *supra* note 5, ¶ 1012[2] at 91-5 ("The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner may be barred by the statute of limitations."); 5 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2540 (1979 Replacement Vol.) (describing the origin of the doctrine of adverse possession according to the limitations model); 4 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY ¶¶ 1133, 1134 (1975) (same); *see also* 3 AM. JUR. 2d *Adverse Possession* § 3, at 94 (1986) ("Adverse possession is based on the fact of running of the statute of limitations applicable to actions for the recovery of property."); 2 C.J.S. *Adverse Possession* § 2, at 646 (1972) ("The foundation of title by adverse possession is the failure of the true owner to commence an action for the recovery of the land involved within the period designated by the statute of limitations."); *cf.* 5 RESTATEMENT OF PROPERTY, ch. 38, Introductory Note, at 2922-23 (1944) (discussing the limitations model in the context of prescription and adverse possession).

7 The scant modern scholarship on adverse possession generally accepts this model. *See* Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723 (1986); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 677 (1986); Jeffry M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT. REV. L. ECON. 217 (1986); Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 79-81 (1985). A brief criticism of this view is set forth in Helmholz, *supra* note 4. Professor Helmholz observed that the litigated cases often "do not lend themselves to analysis in terms of the

ions[8] embrace this limitations model with remarkable uniformity. The model is rooted in the same policies underlying any statute of limitations: avoiding "stale claims" and allowing repose.[9]

This approach envisions adverse possession as an efficient, although perhaps imperfect, device to protect title from frivolous challenges. Possession functions as a litmus test to resolve competing title claims.[10] An owner presumably occupies, or at least uses, his property; thus, possession serves as objective evidence of title. If the true owner is not in possession of her land, the presence of the adverse possessor affords her constructive notice of a hostile title claim. Under these circumstances, the dispossessed owner is expected to vindicate her superior title through filing a timely suit in ejectment. The putative owner's failure to sue is effectively construed as an admission of inferior title.

At some point, however, the true owner's opportunity to challenge the possessor's title must end. Delay decreases the availability and reliability of evidence; wituesses die, memories fade and documents are lost. Adjudications premised on such stale evidence are prone to error. Moreover, the possessor is ultimately entitled to "repose," or freedom from the nagging concern generated by title insecurity. Under the limitations model, repose addresses the traditional

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accrual of a cause of action." *Id.* at 335. He suggested that modern adverse possession cases could best be explained as judicial attempts to allow adverse possession only when the claimant has acted in good faith. For Helmholz, then, the adverse possession elements—possession which is actual, open, hostile and so forth—serve to manifest the claimant's good faith. *Id.* at 337-41. Professor Cunningham challenged the Helmholz good faith model in Cunningham, *supra* note 4. Further salvos followed, focusing on the validity of the good faith model. *See* R.H. Helmholz, *More On Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 (1986); Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167 (1986). At the risk of provoking further academic warfare, I suggest a third alternative tied to the nature of the property involved—the development model.

8 *See, e.g.*, Gilardi v. Hallam, 636 P.2d 588, 590 (Cal. 1981) (discussing limitations model); Kluckhuhn v. Ivy Hill Ass'n, Inc., 461 A.2d 16 (Md. Ct. Spec. App. 1983) (same); Gibson v. State Land Comm'r, 374 So. 2d 212, 215 (Miss. 1979) (same); Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 2-3 (Pa. 1988) (same).

9 *See* Devins v. Borough of Bogota, 592 A.2d 199, 202 (N.J. 1991); *see also* 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.2 at 759 (discussing concern for repose and avoidance of stale claims); 7 POWELL, *supra* note 5, ¶ 1012[2] at 91-5 (discussing concern for "aging claims" and the need to "assure security to a person claiming to be an owner"); 4 TIFFANY, *supra* note 6, ¶ 1134 at 698 (discussing concern about "the making of illegal claims after the evidence necessary to defeat them has been lost" and "the settlement and repose of titles").

10 This spirit is reflected in the famous quotation from Sir Frederick Pollock that: "It is better to favor some unjust than to vex many just occupiers." Henry W. Ballantine, *Title By Adverse Possession*, 32 HARV. L. REV. 135, 136 (1918).

common law concern for certainty of title,[11] which in turn promotes marketability.

The resulting title protection accorded to the victorious adverse possessor (hopefully the true owner) may give him the confidence to use the property. Indeed, the limitations model is occasionally defended on the ground that such repose encourages the utilization of land.[12] Allusions to land use, however, evoke the image of developed property. One envisions, for example, that repose might encourage the successful adverse possessor to cultivate an idle farm. No case or commentator suggests that the central purpose of adverse possession is to stimulate the utilization of wild, undeveloped lands.[13] Indeed, advocates of the limitations model largely ignore the strand of adverse

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11 *See* Ballantine, *supra* note 10, at 135 (arguing that the purpose of adverse possession is "automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing"); *see also* Gibson v. State Land Comm'r, 374 So. 2d 212, 215 (Miss. 1979) (noting that the purpose of adverse possession is stabilizing and quieting land titles); Republic Nat'l Bank of Dallas v. Stetson, 390 S.W.2d 257, 262 (Tex. 1965) (stating the purpose of adverse possession is "settlement and repose of titles").

12 Although the vast majority of decisions, and most treatises, do not mention land utilization as a policy implemented by adverse possession, this theme is sometimes listed as one of many policies served by the doctrine. *See, e.g.*, 7 POWELL, *supra* note 5, ¶ 1012[3] at 91-11 (listing "efficient allocation of our limited land resources" as one of several policies); Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1054 (Alaska 1977) (mentioning several policies served by the doctrine, including making use of idle land); Armstrong v. Cities Serv. Gas Co., 502 P.2d 672, 680 (Kan. 1972) (noting "beneficial and productive use of the land" among other policies). Related to this point is the archaic dispute as to whether adverse possession is intended to punish owners who "sleep on their rights," to reward the active adverse possessor, or neither. *See, e.g.*, Ballantine, *supra* note 10, at 135 (arguing that adverse possession is intended not to punish owners or reward adverse possessors, but rather to serve neutral limitations goals); *see also* Axel Teisen, *Adverse Possession-Prescription*, 3 AM. BAR ASS'N J. 126, 127 (1917) (suggesting that acquisitive prescription, the civil law equivalent to adverse possession, was "founded upon the economic conception that all things should be used according to their nature and purpose"); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U. L. REV. 1122, 1130 (1985) (arguing that adverse possession is not intended to punish the "sleeping owner"). Twentieth century American legal thought has overwhelmingly resolved this debate in favor of the third viewpoint, in the form of the limitations model. The victory of the limitations model has been so complete that it is difficult to find a serious assertion made within the last seventy-five years that the main purpose of the doctrine is to encourage land utilization. In fact, I have been unable to find any legal scholarship suggesting that the central purpose of adverse possession as applied to wild land is to stimulate development, nor have I found any scholarship discussing the wild land branch of the doctrine, aside from the occasional treatise reference.

13 At least one court has mentioned the historical link between adverse possession and wild land development. *See* Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring and dissenting) (noting that adverse possession law was developed "when much of the continental United States was unsurveyed wilderness" and that the "courts adopted a public policy that as much land should be put to use as possible"); *see also* CALLAHAN, *supra* note 5, at 91 (discussing generally "encouragement of the development of vacant lands" as one of several bases for adverse possession, although not mentioning wild or natural land specifically).

possession law applicable to wild lands. According to the logic of the limitations model, any impact on land use is seen as a byproduct, not a primary end.[14] Land utilization is a muted, subordinate theme in a doctrine dominated by concern for title protection.

On balance, the limitations model appears relatively innocuous from an environmental standpoint. But this model is more mirage than reality. Beginning in the nineteenth century, American courts serving the ideology of economic expansion reformulated adverse possession in the pursuit of national productivity. These courts transformed the doctrine from a mechanism designed to *protect* the title of the true owner against false claims into a tool designed to *transfer* title to wild lands from the idle true owner to the industrious adverse possessor. Although the shell of the limitations model remained in terminology and judicial rhetoric, its substance slowly evaporated.

A. The Limitations Model Mirage

The origin of adverse possession in England is shrouded in a feudal haze.[15] Scholars tracing its evolution typically begin with the 1275 Statute of Westminster,[16] which limited actions for the recovery of land by precluding a suitor from alleging dated claims.[17] The suitor utilizing a writ of right, for example, could not raise an ancestor's ownership claim that had existed before 1189.[18] This statute and its immediate successors[19] functioned in an era of property law sculpted by the nearly-metaphysical construct of seisin. Ownership stemmed from seisin, which in turn was founded on actual possession under the

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14 *See, e.g.*, Ballantine, *supra* note 10, at 135 (asserting that the policy underlying adverse possession is not "to reward those using the land in a way beneficial to the community"). For judicial agreement, see Finley v. Yuba County Water Dist., 160 Cal. Rptr. 423, 427 (Cal. Ct. App. 1979) (stating that the intent of modern adverse possession "is not to reward the taker or punish the person dispossessed") and cases cited *supra* notes 8, 11.

15 *See, e.g.*, 5 THOMPSON, *supra* note 6, § 2540 at 573 (discussing the difficulty in separating the statute of limitations approach from one based on seisin).

16 Statute of Westminster I, 3 Edw. I, c. 39 (1275).

17 *See, e.g.*, 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.1 at 755 (attributing origin of adverse possession to Statute of Westminster). Use of the Statute of Westminster as a starting point betrays a certain common law myopia. A rudimentary form of adverse possession may be found as early as 2000 B.C. in the Code of Hammurabi:

> If a captain or a soldier has neglected his field, his garden and his house, instead of working them; and another takes his field, his garden and his house, and works them for three years; if he returns and desires to till his field, his garden, and his house, they shall not be given him. He that has taken and worked them shall continue to use them.

THE HAMMURABI CODE AND THE SINAITIC LEGISLATION 32-33 (Chilperic Edwards ed., 1904). For a discussion of similar principles of Roman law, see *infra* note 170.

18 *See* 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.1.

19 A series of successor statutes followed in later centuries. *See* 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.1 at 755-56.

claim of a freehold estate, and not on the modern concept of title.[20] The disseised owner, the owner out of possession, lost his entire legal right to the property. Thus, from the feudal perspective, ownership was inextricably tied to possession.[21] Cloaked in the mantle of seisin, the possessor held legal rights that today would equate with title. These early statutes provided that a claimant could not rely on the seisin of his ancient predecessors in challenging the right of the present occupant.

As English legal theory gradually separated ownership from possession, the rationale behind such statutes shifted. By the fifteenth century, the action of ejectment had become the principal means for challenging the ownership claim of an occupant.[22] With the importance of seisin declining, possession no longer conferred ownership; instead, it served as tangible evidence of the occupant's entitlement to ownership. In an era of comparatively scarce land, decentralized records and crude surveying techniques, lengthy possession may have been the best possible proof of ownership.[23] The land surface of England was thickly settled,[24] the ancient forests had been largely cleared to facilitate agricultural use,[25] and typically owners resided on or near their properties.[26] Under these conditions, it was reasonable to assume that an owner would both inspect his land regularly and oust discovered trespassers. If suit was not brought against an occupant

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20 *See* 5 THOMPSON, *supra* note 6, § 2540 at 573-74; CALLAHAN, *supra* note 5, at 47-53; CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 98-102 (2d ed. 1988); *see also* Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 2 (Pa. 1988) (discussing the early English origins of the doctrine).

21 *See* MOYNIHAN, *supra* note 20, at 99; THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 357-58 (5th ed. 1956).

22 *See* MOYNIHAN, *supra* note 20, at 101.

23 *See* 4 AMERICAN LAW OF PROPERTY, *supra* note 6, § 17.5, at 536-37 (describing English land record system); BEST, *infra* note 24 (discussing comparative scarcity of land in England).

24 By 1650, for example, England and Wales had a combined population of approximately 5,200,000, with a density of 34 persons per square kilometer of land surface, or about 88 persons per square mile. *See* ROBIN H. BEST, LAND USE AND LIVING SPACE 2 (1981).

25 Approximately two-thirds of Britain was once forested. *See* BEST, *supra* note 24, at 10. By the Norman Conquest of 1066, however, most of this forest land had been cleared through persistent cutting, leaving only one-fifth of the country wooded. *Id.* By 1696, it is estimated that about 54% of the land surface of England and Wales was in active agricultural use either as cropland or permanent grazing land, with another 26% in occasional agricultural use for "rough grazing." *Id.* Forest occupied only 16% of the land surface. *Id.* at 15.

26 Despite the social changes wrought by the industrial revolution, most English landowners or their tenants resided on or near their lands as late as the 1700s. 7 POWELL, *supra* note 5, ¶ 904[1] at 82-83. As a result, "the identity of the owner of a particular piece of land tended to be a well-known fact in a locality. . . ." *Id.* Such residence stemmed in part from the difficulty of travel in the era. For example, one author noted that the 200 mile journey from Cornwall to London took three weeks by stage wagon, and that "the prudent traveller made his will before starting out." DUDLEY POPE, LIFE IN NELSON'S NAVY 13 (1981).

acting like an owner, this absence of litigation could reasonably be interpreted as acquiescence by the public in the validity of the occupant's claim to title.

Ultimately, the 1623 Statute of Limitations[27] required that suits to recover possession of land be brought within twenty years. The Statute recited that this limit was necessary for "quieting men's estates, and avoiding of suits,"[28] a rationale that sounds surprisingly modern. The groundwork for the limitations model—inherited by colonial America[29]—was in place.

Transplanted to the abundant, sparsely populated wild lands of North America, however, the assumptions of the limitations model failed. The terrain was too hostile, the forests too impenetrable and the distances too vast for most owners to reside upon or even to inspect their properties regularly. More importantly, possession of land in the English sense, characterized by residence, cultivation or improvement, was often impractical. The minor acts, greatly separated in time, that characterized land use in wilderness areas were unlikely to afford constructive notice to the owner who did inspect occasionally.

The courts of the new United States initially followed the limitations model. By the nineteenth century, however, these courts had begun to reshape the doctrine into the mold of the development model. The limitations model does not satisfactorily explain either the structure of modern adverse possession law applicable to wild lands or the results in many contemporary decisions, although the influence of the model lingers.[30]

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27 21 Jam. I, c. 16 (1623).

28 *Id.*

29 The doctrine which later became known as adverse possession appeared in Virginia as early as 1646, in an effort to help resolve the proverbial conflicts between speculators and squatters. Interestingly, Virginia law required only five years of occupancy to bar an action by the original owner. *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 38-39 (1968). The phrase "adverse possession" was apparently coined in a 1757 English decision, Taylor d. Atkyns v. Horde (1757, K.B.) 1 Burr. 60, 119. *See* Percy Bordwell, *Disseisin and Adverse Possession*, 33 YALE L.J. 1 (1923) (discussing the origin of the phrase). Ironically, while the phrase flourished in the United States, it developed little significance in England. *Id.* at 2.

30 The multitude of fact-bound adverse possession decisions in the United States does not lend itself completely to any single unifying theory. Armed with the ammunition of inconsistent decisions, it may be easier to criticize a theory than to defend it. Although some wild lands adverse possession cases are arguably consistent with the limitations model, many are not. *See infra* notes 58-86. While it is by no means perfect, I contend that the development model is a superior explanation for the structure of adverse possession law applicable to wild lands and the resulting decisions.

1. *The Role of Constructive Notice*

The traditional formula for adverse possession is familiar. To bar the record owner's action for ejectment,[31] the successful adverse possessor must hold actual, hostile, exclusive and continuous possession of land in an open and notorious manner under a claim of right or color of title for a requisite period.[32] Although the limitations period, ranging from five to twenty-five years, is universally established by statute,[33] the remaining elements are typically imposed by case law.[34] Adverse possession is thus an amalgam of statutory and common law.

The requisite period of possession is consistent with the limitations model; in fact, the heart of any statute of limitations is the principle that an action is barred after the passage of a specific time period. But how are the common law elements—actual possession, hostility, exclusivity, continuity, openness and notoriety, and color of title or claim of right[35]—consistent with this model?

The conventional answer is that these elements determine when the true owner's cause of action for ejectment arises.[36] Modern courts, employing limitations model rhetoric, explain that these elements give constructive notice to the true owner of the adverse possessor's claim, thus affording the owner an opportunity to sue.[37] Carol

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31 While adverse possession was historically seen as a defense to an ejectment action, it appears more frequently in modern decisions as an affirmative theory upon which an adverse possessor sues to quiet his title. *See* Cunningham, *supra* note 4, at 62.

32 *See* 7 POWELL, *supra* note 5, ¶ 1012[2]. A minority of states requires that the adverse possessor pay property taxes assessed against the land, at least under some circumstances. *See* 7 POWELL, *supra* note 5, ¶ 1013[2][i]. Such statutes were apparently the product of lobbying efforts in the late nineteenth century by owners of large undeveloped Western tracts, particularly railroads, concerned that existing adverse possession law unduly favored squatters. *See* Averill Q. Mix, Comment, *Payment of Taxes as a Condition of Title by Adverse Possession: A Nineteenth Century Anachronism*, 9 SANTA CLARA L. REV. 244, 250-54 (1969). They may well reflect owner response to the increasing influence of the development model.

33 *See* 7 POWELL, *supra* note 5, ¶ 1014[1], at 91-77 to 91-82 (listing adverse possession periods by state).

34 *See* Cunningham, *supra* note 4, at 3-4.

35 If the "claim of right" standard required, as does the color of title standard, some arguable, pre-existing claim of title to the disputed property, as the phrase implies, an advocate of the limitations model might defend it as a minimal threshold to screen out the land pirate. In other words, one might argue that a mere trespasser is not within the scope of the policies supposedly served by the limitations bar. The majority view, however, is that the "claim of right" need not be a rightful claim. *See* Cunningham, *supra* note 4, at 17-18. Over time the claim of right element has lost whatever independent significance it once may have enjoyed. Modern courts generally find this requirement satisfied by objective conduct—that is, by acts of possession which are actual, open, notorious, hostile, continuous and exclusive. *Id.*

36 *See* Cunningham, *supra* note 4.

37 *See, e.g.*, Walsh v. Emerick, 611 P.2d 28, 31 (Alaska 1980) (stating purpose is to put the owner "on notice of the hostile nature of the possession so that he . . . may take steps to vindicate his rights by legal action") (quoting Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 832 (Alaska 1974)); Emerson v. Maine Rural Missions Ass'n, 560 A.2d 1, 2

Rose analogizes them to a form of speech between the adverse possessor and the true owner, noting that "[a]n owner who fails to correct misleading appearances may find his title lost to one who speaks loudly and clearly, though erroneously."[38]

In this way, the actual possession element ensures that the claimant has engaged in activities on the disputed land. These activities must be sufficiently hostile, exclusive, and open and notorious to afford the requisite type of notice; in other words, it must be clear that the possessor is asserting a title claim. Furthermore, the conduct must be continuous enough to provide the necessary duration of notice. Thus, the activities of the adverse possessor must provide a clear, constant warning, sufficient to prompt suit by the putative owner. The exclusivity element of the model performs the additional function of ensuring that the cause of action has arisen. The putative owner must be ousted from the property as a precondition to any ejectment action.[39] If the possession of the adverse claimant is truly exclusive, then the putative owner is no longer in possession.

Accordingly, the limitations model rests on two fundamental assumptions. First, it assumes that the activities of the adverse possessor are sufficiently obvious in character and duration to afford constructive notice to an inspecting owner.[40] Second, it assumes that a reasonable owner will either remain on his property (thus precluding adverse possession) or at least inspect his property regularly (thus positioning himself to receive constructive notice of any adverse claim).[41]

(Me. 1989) (stating purpose is to "put a man of ordinary prudence, and particularly the true owner, on notice"); Boston Seaman's Friend Soc'y, Inc. v. Rifkin Management, Inc., 473 N.E.2d 702, 704 (Mass. App. Ct. 1985) (stating purpose is to put the true owner on notice so that he can "take steps to vindicate his rights by legal action") (quoting Ottavia v. Savarese, 155 N.E.2d 432, 435 (Mass. 1959)); Weiss v. Meyer, 303 N.W.2d 765, 768 (Neb. 1981) (stating purpose is to "give notice to the real owner that his title or ownership is in danger"); Cooper v. Carter Oil Co., 316 P.2d 320, 323 (Utah 1957) (noting purpose is to give notice to true owner); *see also* 7 POWELL, *supra* note 5, ¶ 1012[3] (discussing various rationales that support the adverse possession doctrine).

38 *See* Rose, *supra* note 7, at 80. Professor Rose relies on the definition of "possession" found in Slatin's Properties, Inc. v. Hassler, 291 N.E.2d 641, 643 (Ill. 1972) (defining possession through acts that "apprise the community[,] . . . arrest attention, and put others claiming title upon inquiry").

39 *See, e.g.*, Raftopoulos v. Monger, 656 P.2d 1308, 1311 (Colo. 1983) (noting that "the possession of the adverse claimant must be such that the true owner is wholly excluded therefrom") (quoting Dzvris v. Kucharik, 434 P.2d 414, 416 (Colo. 1967)); *see also* cases cited *infra* notes 91-95.

40 This assumption includes another. The true owner must also be able to determine the identity of the adverse claimant so as to name him as a defendant in an ejectment action. In the wild lands context, it may be easier to detect physical evidence of another claimant's activities on the property (for example, in the form of stumps following timber removal) than it is to identify the claimant.

41 *See, e.g.*, Whittom v. Alexander-Richardson Partnership, 851 S.W.2d 504, 509 (Mo. 1993) (reciting that "the law presumes that every man knows the condition and status of

These assumptions apply neatly to the classic case—adverse possession of a developed parcel, such as land improved with a house or farm—upon which the limitations model was premised in agricultural England. Suppose, for example, that *O* owns and operates a 1000 acre farm. Because the land is in agricultural use, almost all states would require that *A*, a hopeful adverse possessor, either reside on the land, install improvements such as fences and outbuildings or cultivate part of the land continuously during the statutory period.[42] If *A* began one of these activities, perhaps planting corn, it would be a readily visible challenge to the rights of *O*, suggesting a claim of title rather than a mere trespass. Even if *O* did not reside on the farm, he would be expected to visit it periodically during the growing season to plant and nurture his own corn crop, or to visit it at least once during the statutory period. *O* would discover *A*'s corn field, gain notice of this adverse claim, and presumably sue to eject him. Alternatively, if *O* learned that *A* was regularly growing corn on the land, and failed to act for a number of years, it would be reasonable to infer that *O* had acknowledged the validity of *A*'s title claim.[43]

Applied to this paradigm, the concept of actual, unquestioned possession as evidence of ownership has merit. In such a case, the limitations model bars frivolous challenges against the true owner. Yet reported decisions involving this fact pattern are rare.[44] Most modern adverse possession decisions involve claims to either tracts of wild land or disputed border strips in developed areas.[45] The assumptions of the limitations model fit neither situation.[46]

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his land" such that if no lawsuit is brought against an adverse claimant "the law assumes that the owner has acquiesced in the adverse claim").

42 *See, e.g.*, Mack v. Luebben, 341 N.W.2d 335 (Neb. 1983) (involving 15 acre field acquired through cultivation); *see also* Hayes v. Cotter, 439 So. 2d 102 (Ala. 1983) (involving border strip acquired through cultivation); Dowell v. Fleetwood, 420 N.E.2d 1356 (Ind. Ct. App. 1981) (same).

43 Another possibility is that O has abandoned the property. Presumed owner abandonment and acquiescence are sometimes mentioned as factors underlying adverse possession law. *See* Gibson v. State Land Comm'r, 374 So. 2d 212, 215-17 (Miss. 1979); Brylinski v. Cooper, 624 P.2d 522, 525 (N.M. 1981); Laird Properties New England Land Syndicate v. Mad River Corp., 305 A.2d 562, 567 (Vt. 1973); *see also* Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring and dissenting) (criticizing the owner abandonment rationale); *cf.* Jerome J. Curtis, Jr., *Reviving the Lost Grant*, 23 REAL PROP., PROB. & TRUST J. 535 (1988) (discussing the evidentiary significance of long occupancy in the analogous context of the lost grant doctrine).

44 This classic fact pattern is rarely seen. *But see* Mack v. Luebben, 341 N.W.2d 335 (Neb. 1983) (involving 15 acre field acquired through cultivation).

45 This observation stems from my review of hundreds of post-1950 reported adverse possession decisions.

46 The most common application of adverse possession to developed property involves a boundary line dispute between two adjacent homeowners. *See* Sims v. Vandiver, 504 So. 2d 250 (Ala. 1987); Ross v. McNeal, 618 S.W.2d 224 (Mo. Ct. App. 1981). The limitations model usually does not fit this scenario, because most of these cases involve mutual ignorance.

2. *Mirage and Reality*

The explanatory force of the limitations model collapses when the adverse possession claim involves wild lands such as forests, grasslands, wetlands or deserts. If we modify the hypothetical by assuming that *O* owns a remote 1000 acre forest tract that he has elected to preserve in its natural condition, both assumptions underpinning the limitations model will probably fail. Adverse possession of wild lands is governed by an unusually low legal threshold; even occasional, minor actions such as gathering firewood, seasonal grazing or limited timber removal may meet the common law requirements. *O* would probably remain unaware of these activities unless he was actually present on the land during their brief duration. Moreover, *O* is unlikely to visit the land because visitation is inconsistent with his preservation goal. Even if by remote coincidence *O* and *A* visited the land simultaneously, given the size and topography of the property, each might inadvertently miss the other. Thus, even though *A*'s activities on the land may be sufficient in quality and duration to sustain an adverse possession claim, it is doubtful they will afford notice if *O* inspects. In this way, modern American law generally allows adverse possession of wild lands even under circumstances in which it is highly unlikely that the true owner will receive notice of the competing claim.

a. *Acts of the adverse claimant*

If American courts followed the limitations model, it would be more difficult to adversely possess wild land than developed land. All other things being equal, acts performed on wild land are less likely to afford constructive notice to the owner than acts performed on developed land, due to topography, parcel size and owner absence. For example, an adverse possessor's one acre corn field may provide ample notice to the resident owner of a 1000 acre farm. In contrast, an adverse possessor's activities on a one acre clearing are very unlikely to afford notice to the absentee owner of 1000 acres of forest. Under the limitations model, therefore, one would reasonably expect a requirement that the activities of the adverse possessor of wild land be *greater* in quality and duration than those required for adverse possession of developed land. Such a heightened standard might increase the likelihood that an owner of wild land would receive notice.

In reality, however, the standard for adverse possession of wild lands is just the *opposite*. Almost all states[47] allow adverse possession of

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47 *See infra* notes 49-53. Only four states wholly reject this approach. *See, e.g.*, Senn v. Western Mass. Elec. Co., 471 N.E.2d 131, 133 (Mass. App. Ct. 1984) (requiring fencing in order to adversely possess woodlands); Seven Springs Farm, Inc. v. King, 344 A.2d 641, 646 (Pa. Super. Ct. 1975) (noting that if "invisible" actions could support adverse possession,

wild lands based on activities which are *inferior* in quality and duration to those required for developed lands.[48] In some states this rule is express: the adverse possessor of lands which are characterized as

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then "no owner of uninhabited wild lands would be safe"); Maynard v. Hibble, 418 S.E.2d 871, 873-74 (Va. 1992) (implying that adverse possession of wild lands would be more difficult than for developed lands in Virginia); Pierz v. Gorski, 276 N.W.2d 352, 356 (Wis. Ct. App. 1979) (denying adverse possession claim because Wisconsin public policy favors open use of wild lands by the public); *see also* MASS. ANN. LAWS ch. 260, § 21 (Law. Co-op. 1992) (establishing an exception to the Massachusetts adverse possession statute for certain property owned by a nonprofit conservation organization or land trust). Ten states—California, Florida, Idaho, Montana, Nevada, New York, North Dakota, South Carolina, South Dakota and Utah—operate under statutes which partially set forth the nature of the actions required for adverse possession. These states typically require cultivation, improvement or enclosure when adverse possession is merely premised on a "claim of right," but permit adverse possession founded on color of title to be based on less visible actions, including pasturage, firewood gathering or the ordinary use of the occupant. *See* CAL. CIV. PROC. CODE §§ 323, 325 (West 1982 & Supp. 1993); FLA. STAT. ANN. § 95.16, 95.18 (West 1982 & Supp. 1993); IDAHO CODE §§ 5-208, 5-210 (1990 & Supp. 1993); MONT. CODE ANN. §§ 70-19-408, 70-19-410 (1993); NEV. REV. STAT. §§ 11.120, 11.140 (1986 & Supp. 1991); N.Y. REAL PROP. ACTS. LAW §§ 512, 522 (McKinney 1979 & Supp. 1994); N.D. CENT. CODE §§ 28-01-09, 28-01-11 (1991); S.C. CODE ANN. §§ 15-67-230, 15-67-250 (Law. Co-op. 1977 & Supp. 1992); UTAH CODE ANN. §§ 78-12-9, 78-12-11 (1992). Nonetheless, courts in these states often interpret these requirements away, effectively allowing adverse possession of undeveloped land through sporadic activities that are unlikely to afford constructive notice. A remarkable example is Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992), where a tax assessor's office employee purposely set out to adversely possess a parcel of "isolated timberland" to which he had no claim whatsoever. Toward this end, he hunted, fished and camped on the land, posted a few "No Trespassing" signs, thinned timber once, paid assessed taxes and at one point changed the manner in which a creek flowed. *Id.* at 116. The Idaho Supreme Court overturned a summary judgment decision in favor of the true owner, on the basis that these acts were sufficient to raise a question of fact as to whether the adverse possessor had "improved" the land as required for a claim of right; it commented that the required "improvements" would necessarily "vary according to the character of the land, its location, the uses to which it is usually put and all the circumstances bearing on that question." *Id.* at 117; *see also* Tubolino v. Drake, 578 N.Y.S.2d 745, 746 (App. Div. 1991) (finding adverse possession of 10 acre forest parcel based on hunting, fishing, walking, cutting some trees, building small culvert, repairing footbridge, and noting that this was sufficient "cultivation and improvement" under the statute since the "land was unsuitable for farming or other development"); State Dep't of Natural Resources v. Estech, Inc., 515 So. 2d 758, 759 (Fla. Dist. Ct. App. 1987) (concluding that question of fact was presented on whether state had adversely possessed river beds based on existence of state weed control program and state's activities regulating navigation and recreation and noting that "possession is to be determined by the presence of activities suited to the land").

48 Most real property treatises agree that a lesser showing is required to adversely possess wild lands. One leading treatise expresses the rule as follows: "[W]ild and undeveloped land that is not readily susceptible to habitation, cultivation, or improvement does not require the same quality of possession as residential or arable land, since the usual acts of ownership are impossible or unreasonable." 7 POWELL, *supra* note 5, ¶ 1012[2] at 91-98. Similarly, the American Law of Property notes that:

> Wild, undeveloped lands so situated and of such character that they cannot be readily improved, cultivated or resided upon involve a very different degree of control evidenced by much less actual exercise of ownership by affirmative acts to establish possession, since the usual acts of ownership by making improvements, cultivation of the soil and residing on it are impossible or unreasonable.

"wild,"[49] "outlying and uncultivated,"[50] unsuited for "any useful permanent improvement"[51] or "undeveloped,"[52] need only perform the activities which are suited or adapted to the land in its natural condition. In most states, the rule is implicit: the adverse possessor must use the land in the same manner that a reasonable owner would, in light of its nature, character and location.[53] Although the phrasing of

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3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.3 at 766-67. Thompson expresses the same theme:

> [T]he character and locality of the property and the uses and purposes for which it is naturally adapted are taken into consideration, for the possessory acts over an outlying and uncultivated piece of land may be proved by acts of ownership somewhat different from what would be required in regard to land under inclosure and in actual cultivation.

5 THOMPSON, *supra* note 6, § 2542 at 597-98.

49 *See, e.g.*, Snowball Corp. v. Pope, 580 N.E.2d 733, 736 (Ind. Ct. App. 1991) ("What constitutes possession of a 'wild' land may not constitute possession of a residential lot.") (quoting McCarty v. Sheets, 423 N.E.2d 297, 300 (Ind. 1981)); Broadus v. Hickman, 50 So. 2d. 717, 719 (Miss. 1951) ("[L]ess notorious and obvious acts upon the land are essential to vest title in what are known as wild lands than lands suitable to occupancy by residing thereon and putting them to husbandry and farming."); Sherman v. Goloskie, 188 A.2d 79, 84 (R.I. 1963) (noting that for "wild land or remote, unimproved rural land . . . where the land in question is of such a character as to preclude actual occupation or intensified use thereof," adverse possession is established based on uses which "would be made ordinarily of like land by the owners"); Mullis v. Winchester, 118 S.E.2d 61, 65-66 (S.C. 1961). In *Mullis*, the court stated:

> Acts of adverse possession . . . with regard to open, wild, unfenced lands, lands not capable of cultivation, are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property admits of without actual residence or occupancy.

Id.

50 *See, e.g.*, Goen v. Sansbury, 149 A.2d 17, 22 (Md. 1959) (noting that adverse possession of an "outlying and uncultivated piece of land may be proved by acts of ownership somewhat different from those required with regard to land under enclosure and active cultivation").

51 *See, e.g.*, Marvel v. Barley Mill Road Homes, 104 A.2d 908, 912 (Del. Ch. 1954) (finding adverse possession of woodland lot based on hauling trees, posting signs, walking, picnicking and providing game refuge); Manville v. Gronniger, 322 P.2d 789, 793 (Kan. 1958) (finding adverse possession of 227 acre island in Missouri River based on partial clearing of brush and seasonal cultivation of small portion).

52 Wilomay Holding Co. v. Peninsula Land Co., 116 A.2d 484, 487 (N.J. Super. Ct. App. Div. 1955) (noting that for adverse possession of "swampy or largely undeveloped" lands, there need not be "as extensive and as continuous control" as required for improved lands).

53 *See, e.g.*, Douglas-Guardian Warehouse Corp. v. Jordan, 452 F. Supp. 558, 563 (E.D. Okla. 1978) (requiring "ordinary use" of land and "taking the ordinary profits it is capable of yielding in its present state"); Drennen Land & Timber Co. v. Angell, 475 So. 2d 1166, 1172 (Ala. 1985) (stating that claimant need only use land in "a manner consistent with its nature and character") (quoting Hurt v. Given, 445 So. 2d 549, 551 (Ala. 1983)); Nome 2000 v. Fagerstrom, 799 P.2d 304, 309 (Alaska 1990) (observing that the "quality and quantity of acts required for adverse possession depend on the character of the land in question"); Overson v. Cowley, 664 P.2d 210, 217 (Ariz. Ct. App. 1982) (requiring that adverse possessor show that "he occupied or used the land as would an ordinary owner of the same type of land, taking into account the uses for which the land was suitable"); Newman v. Cornelius, 83 Cal. Rptr. 435, 441 (Ct. App. 1970) (noting that adverse possessor need only

this standard varies somewhat,[54] courts in this second group of states generally employ a sliding scale, under which the acts required for adverse possession are reduced for wild land and increased for developed land.[55] Under this special "wild lands standard," the benchmarks of adverse possession applicable to developed lands—permanent residence, cultivation or improvement—are not neces-

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show "slight use" of land if this is all land allows); Kroulik v. Knuppel, 634 P.2d 1027, 1029 (Colo. Ct. App. 1981) (permitting adverse possession when "the property is used in a manner commensurate with its particular characteristics"); Loeb v. Al-Mor Corp., 615 A.2d 182, 188 (Conn. Super. Ct. 1991) (considering "nature and character" of the land); McMillin v. Economics Lab., Inc., 468 N.E.2d 982, 987 (Ill. App. Ct. 1984) (concluding that the possession necessary "is not required to be fuller than the character of the land admits"); I-80 Assoc., Inc. v. Chicago, Rock Island & Pacific R.R. Co., 224 N.W.2d 8, 10 (Iowa 1974) (considering owners' acts "in holding, managing, and caring for property of like nature and condition"); City of Lawrence v. McGrew, 508 P.2d 930, 934 (Kan. 1973) (noting that requisite acts relate to "the type and nature of the property and surrounding circumstances, taking into consideration the particular land, its condition, character, locality, and appropriate use") (quoting Ricke v. Olander, 485 P.2d 1335, 1337 (Kan. 1971)); Gurwit v. Kannatzer, 788 S.W.2d 293, 295-96 (Mo. Ct. App. 1990) (stating that sufficiency of acts depends on "nature" and "character" of the property); Marquez v. Padilla, 426 P.2d 593, 596 (N.M. 1967) (holding that acts need only be "as distinct as the character of the land reasonably admits") (quoting Johnston v. City of Albuquerque, 72 P. 9, 11 (N.M. 1903)); Price v. Tomrich Corp., 167 S.E.2d 766, 775 (N.C. 1969) (noting that adverse possession requires "acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible"); Thompson v. Hayslip, 600 N.E.2d 756, 759 (Ohio Ct. App. 1991) (requiring "such use as would be made of that land by the owner") (quoting Vanasdal v. Brinker, 500 N.E.2d 876, 878 (Ohio Ct. App. 1985)); Knecht v. Spake, 346 P.2d 98, 103 (Or. 1959) (citing various similar standards); Panter v. Miller, 698 S.W.2d 634, 636 (Tenn. Ct. App. 1985) (noting that caliber of proof to show adverse possession elements "is dependent upon the use to which the land is susceptible"); Laird Properties New England Land Syndicate v. Mad River Corp., 305 A.2d 562, 569 (Vt. 1973) ("[U]ltimate fact to be proved is that the claimant has acted towards the land in question as would an average owner, taking properly into account the geophysical nature of this land."); ITT Rayonier, Inc. v. Bell, 774 P.2d 6, 9 (Wash. 1989) (stating that courts must consider "the nature and location of the land in question"); Somon v. Murphy Fabrication & Erection Co., 232 S.E.2d 524, 528 (W. Va. 1977) (noting that acts of dominion are governed by "the location, condition and reasonable uses which can be made of the property"); Shores v. Lindsey, 591 P.2d 895, 900 (Wyo. 1979) (stating that acts of dominion "must be adapted to the particular land, its condition, locality and appropriate use") (quoting Brumagin v. Bradshaw, 39 Cal. 24, 46 (1870)); *cf.* Clifton v. Liner, 552 So. 2d 407, 412 (La. Ct. App. 1989) (stating that acts of possession required for prescription under Louisiana law "are governed to a large extent by the use to which the land is destined or for which it is suitable").

54 *See* cases cited *supra* note 53.

55 Additionally, a few states statutorily encourage adverse possession claims against vacant and undeveloped land. *See, e.g.*, ARK. CODE ANN. § 18-11-102 (Michie 1987 & Supp. 1993) (providing that payment of taxes for seven years under color of title is sufficient to gain title to "unimproved or unenclosed" land); ARK. CODE ANN. § 18-11-103 (Michie 1987 & Supp. 1993) (providing that payment of taxes for 15 years on "wild and unimproved land" creates a presumption of color of title); COLO. REV. STAT. § 38-41-109 (1973) (providing that payment of taxes for seven years under color of title creates ownership of "vacant and unoccupied" land); ME. REV. STAT. ANN., tit. 14, § 816 (West 1964 & Supp. 1992) (providing that requirements for adverse possession of "uncultivated lands" under color of title are relaxed).

sary. Instead, adverse possession may be founded on occasional activities that leave behind little or no visible trace,[56] and accordingly are unlikely to afford constructive notice.[57]

To meet the "actual possession" requirement for a tract of wetlands, for example, the adverse claimant need only take possession to the extent that a reasonable owner of similar wetlands would. Possession, in turn, is typically described in terms of the economic uses allowed by the nature and character of the land.[58] If the only use deemed suitable for the wetland tract is hunting, actual possession might, in an extreme case, be premised on hunting activities.[59] Under this wild lands standard, for example, a Utah claimant gained title to fifty acres of "unbroken and unimproved rangelands" based on

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56 *See, e.g.*, Klingel v. Kehrer, 401 N.E.2d 560, 563, 566 (Ill. App. Ct. 1980) (recognizing adverse possession of a small tract of undeveloped riverside land based on gathering of pecans and occasional cutting of pecan trees, despite the record owner's testimony that he had never seen any stumps or other visible evidence of this activity).

57 I do not suggest that the limitations model has been wholly replaced by the development model. Even in jurisdictions espousing the wild lands standard, the influence of the limitations model is sometimes seen. *See, e.g.*, Hyland v. Kirkman, 498 A.2d 1278, 1283-84, 1289-90 (N.J. Super. Ct. Ch. Div. 1985) (holding that occasional cutting of firewood and Christmas holly trees, plus posting of "No Trespassing" signs with claimant's name and phone number, were insufficient to adversely possess 4663 acre tract of "wild and uncultivated woodland"); Harris v. Walden, 333 S.E.2d 254 (N.C. 1985) (finding that sporadic cutting of timber, firewood gathering, hunting, plus sign posting and boundary blazing, were insufficient to adversely possess 14 acres of "rolling hilly land"); Miller v. Bushnell, 549 P.2d 655, 656-57 (Or. 1976) (holding that occasional pasturing of cattle and horses upon 18 acres of "bushy wilderness" was insufficient as inadequate notice to owner). In particular, some states follow a restrictive rule for woodlands, generally requiring that tree cutting be more substantial and continuous than is ordinarily required for adverse possession activities. *See, e.g.*, Rutland v. Georgia Kraft Co., 387 So. 2d 836, 837 (Ala. 1980) (requiring "such a continuous and persistent cutting of timber or wood from the tract, as to be . . . an advertisement to the world") (quoting Chastang v. Chastang, 37 So. 799, 802 (Ala. 1904)).

58 In general, nonconsumptive uses such as camping, berry picking, picnicking and the like are insufficient to support an adverse possession claim. *See, e.g.*, Harmon v. Ingram, 572 So. 2d 411 (Ala. 1990) (holding berry picking insufficient). These decisions generally require some form of economic use. *See, e.g.*, Klingel v. Kehrer, 401 N.E.2d 560, 566 (Ill. Ct. App. 1980) (noting in dicta that adverse possession cannot be premised on "the doing of 'some useless thing' such as picking a flower").

59 *See, e.g.*, David v. Steller, 269 A.2d 203 (Del. Super. 1970) (holding requirements for adverse possession of 111 acres of marshland partly satisfied by trapping muskrats); Flewelling v. Roby, 82 A.2d 83, 85 (N.H. 1951) (finding requirements for adverse possession to tract on pond satisfied by granting trapping permits and the removal of fish screens); *cf.* Kelso v. Caffery, 58 So. 2d 402, 406 (La. 1952) (allowing transfer of 160 acres of "low and marshy" land based on trapping under Louisiana law of prescription); Voisin v. Luke, 341 So. 2d 6, 10 (La. Ct. App. 1976) (concluding that ownership of "wet marsh" which was "suited only for possession by trapping and hunting" could normally be established by trapping and hunting through prescription); Kline v. Bourbon Woods, Inc., 684 S.W.2d 938, 940 (Mo. Ct. App. 1958) (holding hunting and hiking sufficient to adversely possess forest land); Butler v. Lindsey, 361 S.E.2d 621, 623-24 (S.C. Ct. App. 1987) (implying that hunting and boat docking would have been sufficient for adverse possession of island).

winter stock grazing;[60] in a New Hampshire decision, a claimant acquired title to ninety acres of forest by occasionally cutting timber and Christmas trees.[61] Even though the application of this standard has yielded varying results, courts have nonetheless found the following activities sufficient for "actual possession": fishing,[62] harvesting natural hay,[63] seasonal stock grazing,[64] cutting small amounts of timber[65] and gathering firewood.[66]

More commonly, however, the successful adverse possessor of wild lands in hundreds of post-1950 decisions has relied on a combi-

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60 Adams v. Lamicq, 221 P.2d 1037 (Utah 1950).

61 Barnard v. Elmer, 515 A.2d 1209, 1212 (N.H. 1986).

62 *See, e.g.*, Le Sourd v. Edwards, 86 N.E. 212 (Ill. 1908) (permitting adverse possession of 15 acres of wetlands based on seasonal, underwater fish trapping).

63 *See* Weiss v. Meyer, 303 N.W.2d 765, 771 (Neb. 1981) (allowing adverse possession of grassland strip based on harvesting natural hay); Thompson v. Hayslip, 600 N.E.2d 756, 759 (Ohio Ct. App. 1991) (permitting adverse possession based on hay cutting); *see also In re* Property Extending From Flushing Bay to Interborough Parkway, 2 N.Y.S.2d 374 (Sup. Ct. 1937), *aff'd In re* Public Park Site, 27 N.Y.S.2d 408 (App. Div. 1941), *aff'd In re* New York (Flushing Bay Park), 47 N.E.2d 434 (N.Y. 1943) (allowing adverse possession of meadowland based on cutting of salt hay); Evans v. Lux, 201 N.Y.S. 161 (Sup. Ct. 1923) (finding adverse possession of marshland based on the cutting of wild hay and slag).

64 *See, e.g.*, Cleveland v. Dow Chem. Co., 451 P.2d 741 (Colo. 1969) (allowing adverse possession based on stock grazing); Griswold v. Lagge, 313 P.2d 1013, 1014 (Mont. 1957) (finding adverse possession of unfenced, wild land based on seasonal sheep grazing); Quarles v. Arcega, 841 P.2d 550, 561 (N.M. Ct. App. 1992) (permitting adverse possession of 63 acres of rangeland based on seasonal grazing); Springer v. Durette, 342 P.2d 132, 135 (Or. 1959) (allowing adverse possession based on seasonal grazing on unenclosed land); Cooper v. Carter Oil Co., 316 P.2d 320, 324 (Utah 1957) (finding adverse possession of range land based on three weeks of grazing each season); Adams v. Lamicq, 221 P.2d 1037 (Utah 1950) (permitting adverse possession of about 50 acres of "unbroken and unimproved rangelands" through winter stock grazing). *But see* State *ex rel.* Lassen v. Self-Realization Fellowship Church, 517 P.2d 1280, 1283 (Ariz. Ct. App. 1974) (finding seasonal grazing on 80 acres of "unfenced, unimproved desert land" insufficient for adverse possession).

65 *See, e.g.*, Sheppard v. T.R. Miller Mill Co., 332 So. 2d 374, 375-76 (Ala. 1976) (permitting adverse possession of 40 acres of swamp and timberland permitted based on the taking of limited timber); McMullen v. Dowley, 418 A.2d 1147, 1151-52 (Me. 1980) (finding adverse possession of woodland area based on timber cutting); Bratton v. Hitchens, 405 A.2d 333, 339 (Md. Ct. Spec. App. 1979) (allowing adverse possession based, in part, on limited timbering); Barnard v. Elmer, 515 A.2d 1209, 1212 (N.H. 1986) (finding adverse possession of 90 acre forest tract based on cutting timber and Christmas trees); Allison v. Shepherd, 591 P.2d 735, 740 (Or. 1979) (allowing adverse possession of "steep hillside dominated by trees" based on limited tree cutting and posting signs).

66 *See, e.g.*, Sleboda v. Heirs at Law of Harris, 508 A.2d 652, 657 (R.I. 1986) (finding adverse possession of 15 acres of woods based on gathering firewood, cutting trees on visits); *see also* Stowell v. Swift, 576 A.2d 204, 205 (Me. 1990) (permitting adverse possession of timberland based in part on gathering firewood and picnicking); Johnson v. Town of Dedham, 490 A.2d 1187, 1190 (Me. 1985) (allowing adverse possession of woodland tract by cutting firewood and allowing others to pick berries); *cf.* Gurwit v. Kannatzer, 788 S.W.2d 293, 294-95 (Mo. Ct. App. 1990) (finding adverse possession of 17 acres of "rough, brushy, wooded land" based on cutting firewood, picking up trash, and posting signs); Derryberry v. Ledford, 506 S.W.2d 152, 154-55 (Tenn. Ct. App. 1973) (permitting adverse possession of "wooded" lot based on cutting firewood, cleaning up trash and posting signs).

nation of comparatively minor activities,[67] none of which is likely to afford notice to the true owner. For example, a Maine claimant gained title to a large forest tract by gathering firewood, removing gravel, hunting and picnicking.[68] In Missouri, a claimant of a forest parcel based his action on hunting and hiking activities.[69] An Oregon claimant acquired title to a tract of "exceedingly wild" land through limited clearing, cutting trees, picnicking and removing several loads of leaf mold.[70] Another claimant premised adverse possession of a five acre wetland parcel in Alabama on hunting, occasional cattle grazing and limited timber cutting.[71]

The requirements of "openness" and "notoriety" are similarly diluted when applied to wild lands. Rather than treating these as independent elements that ensure a particular quality of notice, courts

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67 *See, e.g.*, Houston v. United States Gypsum Co., 569 F.2d 880, 884-86 (5th Cir. 1978) (noting that hunting, sign posting and cultivating may suffice for adverse possession of part of island); Drennen Land & Timber Co. v. Angell, 475 So. 2d 1166, 1172 (Ala. 1985) (finding successful adverse possession of timberland area based on cutting timber once, holding picnics, clearing some undergrowth and marking off homesites); Harris v. Pinelog Properties, Inc., 474 So. 2d 1113, 1115 (Ala. 1985) (allowing adverse possession of 10 acres of "wild, uncultivated land" based on hunting, cutting timber five times in 21 years, and issuance of oil, mineral and gas leases); Alaska Nat'l Bank v. Linck, 559 P.2d 1049 (Alaska 1977) (finding adverse possession of 44 acres of forested land based on cultivation of seasonal garden for two years, cleaning up litter, and erection of barrier at boundary); Cluff v. Bonner County, 824 P.2d 115, 117 (Idaho 1992) (finding a question of fact whether hunting, fishing, camping, timber thinning, movement of one tree, posting signs, and altering stream flow were sufficient to adversely possess tract of "isolated timberland"); City of Lawrence v. McGrew, 508 P.2d 930, 934 (Kan. 1973) (finding successful adverse possession of 200 acre tract of low, often flooded land based on timber removal and seasonal farming); Rieke v. Olander, 485 P.2d 1335, 1336-37 (Kan. 1971) (permitting adverse possession of riverside land subject to frequent flooding based on timber removal, occasional pasturing and seasonal farming of small part); Manville v. Gronniger, 322 P.2d 789, 793 (Kan. 1958) (allowing adverse possession of 228 acre island in Missouri River based on clearing brush, farming small part, and building partial fence); Clifton v. Liner, 552 So. 2d 407, 410-11 (La. Ct. App. 1989) (finding successful prescription under Louisiana law to over 100 acres of swampland based on timber removal and hunting); Stowell v. Swift, 576 A.2d 204, 205 (Me. 1990) (permitting adverse possession of uncultivated land based on cutting firewood, selling gravel, family picnics and hunting); Johnson v. Town of Dedham, 490 A.2d 1187, 1190 (Me. 1985) (finding successful adverse possession based on limited woodcutting and permitting berry picking); Monroe v. Rawlings, 49 N.W.2d 55, 56-59 (Mich. 1951) (allowing adverse possession of 640 acres of "wild, undeveloped" land based on hunting, fishing, selling timber and leasing); Hitchcock v. Ledyard, 48 Okla. Bus. Ass'n J. 2525 (Okla. Ct. App. 1977) (permitting adverse possession of 600 acres in "wild state" based on seasonal cattle grazing, limited timber cutting and limited clearing); Cuka v. Jamesville Hutterian Mut. Soc'y, 294 N.W.2d 419, 422 (S.D. 1980) (allowing adverse possession of 13 wooded acres based on farming limited timber cutting and some seasonal grazing); Panter v. Miller, 698 S.W.2d 634, 636 (Tenn. Ct. App. 1985) (permitting adverse possession of tract of "rugged mountain land" based on bulldozing line around parcel, planting trees, and posting sign).

68 Stowell v. Swift, 576 A.2d 204, 205 (Me. 1990).

69 Kline v. Bourbon Woods, Inc., 684 S.W.2d 938, 940 (Mo. Ct. App. 1985).

70 Knecht v. Spake, 346 P.2d 98 (Or. 1959).

71 Pierson v. Case, 133 So. 2d 239 (Ala. 1961).

commonly ignore them altogether. These courts often find openness and notoriety implicit in acts of "actual possession,"[72] even when the acts of possession are sporadic and leave behind no visible evidence. When courts analyze these elements separately, they frequently are persuaded by the argnment that these activities, although sporadic, were visible during the brief time that the adverse possessor was actually on the land.[73] In one particularly unusual case, an adverse possessor of fifteen acres of seasonally inundated wetlands based his claim merely on the installation of twenty subsurface fish traps; each trap was invisible from above because it was roped below the water line to a tree.[74] Responding to the record owner's objection that this use was not open and notorious, the court concluded that the fish traps "constituted a visible appropriation [of the land] for the only purpose for which the land could be used."[75] The adverse possessor's employees were, the court noted, "in open view of passers as they blazed the trees . . . and attached the traps."[76]

Similarly, in most states the same minor activities that establish "actual possession" of wild lands fulfill the elements of "hostility" and "claim of right."[77] Courts reason that the performance of these activities serves as objective evidence of all three elements. To establish "hostility," the claimant need not actually prove subjective hostile intent; to demonstrate a "claim of right," the claimant need not show that his supposed title claim has any objective basis.[78]

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72 *See, e.g.*, Bergen v. Dixon, 527 So. 2d 1274, 1277 (Ala. 1988) (mentioning openness and notoriety as separate elements, but analyzing only actual possession element); Grubb v. State, 433 N.W.2d 915, 918 (Minn. Ct. App. 1988) (mentioning openness as separate element, but analyzing only actual possession element); *see also* Kroulik v. Knuppel, 634 P.2d 1027, 1029 (Colo. Ct. App. 1981) (failing to mention openness and notoriety but considering possessory acts in general); Barnard v. Elmer, 515 A.2d 1209, 1212 (N.H. 1986) (same).

73 *See, e.g.*, Gurwit v. Kannatzer, 788 S.W.2d 293, 295 (Mo. Ct. App. 1990) (finding successful adverse possession claim to 17 acres of "rough, brushy, wooded land" based on cutting firewood, posting "no trespassing" signs and cleaning up trash and holding that the requirement of openness and notoriety was met on the ground that anyone visiting the land could not fail to notice the adverse claimant picking up trash and cutting firewood).

74 Le Sourd v. Edwards, 86 N.E. 212, 213 (Ill. 1908).

75 *Id.* at 214.

76 *Id.*

77 *See, e.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 832 (Alaska 1974) (noting that (a) the test for hostility is objective, based on whether the adverse possessor has "acted toward the land as if he owned it" and (b) claim of title (or claim of right) means only that the "possessor must use and enjoy the property continuously for the required period" as would an average owner).

78 In most states, hostility does not require subjective hostile intent, regardless of the nature of the property involved. Instead, courts reason that objective acts of possession manifest hostility. *See* Bergen v. Dixon, 527 So. 2d 1274, 1277 (Ala. 1988); Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 832-33 (Alaska 1974); Grubb v. State, 433 N.W.2d 915, 918 (Minn. Ct. App. 1988). Moreover, the claim of right element largely duplicates the hostility element, again regardless of the type of property. *See* 7 POWELL,

Finally, the continuity requirement is often subsumed in the single question of "actual possession."[79] Indeed, while continuity may be a meaningful construct in the context of developed property such as a farm, courts accord it little significance in wild lands cases. Despite the occasional expression of judicial concern that periodic trespasses should not justify adverse possession,[80] courts generally conclude that, in the wild lands context, the continuity requirement must accommodate the nature and character of the property.[81] Thus, acts of possession need only be as continuous—or sporadic—as those of a reasonable owner.[82] If such an owner uses or visits his wild property rarely, similar conduct by the adverse claimant will be deemed "continuous" possession.[83] Accordingly, courts have held that the following activities meet the continuity requirement: visiting biannually to cut a few trees and gather firewood;[84] cutting wild grass for four days each year;[85] and using the land for grazing for three weeks each year.[86]

Modern adverse possession law does not maximize constructive notice for the owner of wild lands. *O*, a hypothetical owner of wetlands, might visit the property yearly and see no evidence that *A*, an adverse possessor, was using portions of it for seasonal stock grazing, hay cutting or firewood gathering. The statutory period for *O* to sue might well lapse, vesting title by adverse possession in *A*, even though

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supra note 5, ¶ 1013[2] at 91-42. Objective acts of possession thus also fulfill the claim of right requirement, as long as those acts are not undertaken on bebalf of another claimant. *Id.*

79 Thus, for example, the American Law of Property concludes:

> [P]ossession may exist in a person who uses the land in the way in which an average owner of the particular type of property would use it though he does not reside on it and his use of it involves considerable intervals in which the land is not actually used at all.

3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.3 at 767-68.

80 *See* Pate v. Junkin, 489 S.W.2d 802, 803 (Ark. 1973); Gore v. Hall, 112 A.2d 675, 677 (Md. 1955); Edmonds v. Thurman, 808 S.W.2d 408, 411 (Mo. Ct. App. 1991); Price v. Tomrich Corp., 167 S.E.2d 766, 775 (N.C. 1969).

81 *See, e.g.*, Teson v. Vasquez, 561 S.W.2d 119, 127 (Mo. Ct. App. 1977) ("In judging the continuity of possession, the character and use to which the land is adaptable must be taken into account."); Wilomay Holding Co. v. Peninsula Land Co., 116 A.2d 484, 487 (N.J. Super. Ct. 1955) ("It may he conceded that to make out title, through adverse possession, with respect to lands so far as they are swampy or largely undeveloped, there need not be as extensive and as continuous control as with respect to improved lands.").

82 *See, e.g.*, Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1052 (Alaska 1977) (noting that the nature of possession sufficient to meet the continuity requirement depends on the nature of the property itself, and applying test based on whether "the adverse possessor has used and enjoyed the land as 'an average owner of similar property would use and enjoy it' ") (citing 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 15.3 at 765).

83 *See, e.g.*, Alaska Nat'l Bank v. Linck, 559 P.2d 1049 (Alaska 1977) (noting that claimant visited 44 acres of forested land on occasion).

84 Sleboda v. Heirs at Law of Harris, 508 A.2d 652, 657-58 (R.I. 1986).

85 Weiss v. Meyer, 303 N.W.2d 765, 770 (Neb. 1981).

86 Cooper v. Carter Oil Co., 316 P.2d 320, 323-24 (Utah 1957).

O could not reasonably have known of *A*'s activities. Not surprisingly, owners in wild lands cases who did visit their land during the statutory period commonly testify in later proceedings that they saw no traces of the activities upon which the adverse possessors rely.[87]

The wild lands standard is thus wholly *inconsistent* with the goal of constructive notice, and therefore *inconsistent* with the limitations model. The standard has no logical connection to notice. Through slight and sporadic activity, claimants can adversely possess remote properties that lack immediate economic value and are rarely visited by their owners. Yet adverse possession of developed properties, where record owners would normally reside or work, requires substantial, continuous activity. The activities necessary for a successful adverse possession claim are defined by what the character of the land allows, not by what reasonable notice requires. Moreover, even if the owner receives actual notice of the adverse claim—thus fulfilling the purpose of the limitations model—the adverse possessor must still prove that his activities on the land meet the legal standard for adverse possession.[88]

Although the wild lands standard employs the traditional labels for the adverse possession elements, it distorts their meanings almost beyond recognition. "Actual possession" does not actually require possession; secretive acts are deemed "open and notorious;" the "hostile" claimant need not be truly hostile; the "claim of right" need not be a rightful claim; and intermittent actions are considered "continuous." This lingnistic strain betrays an underlying tension. Even though the form of the limitations model remains in terminology, its substance has vanished. The limitations model is a mirage.

Courts make remarkably little effort to justify the wild lands standard. The typical (and circular) explanation is that, in the case of undeveloped lands, the "usual acts of ownership are impossible or unreasonable."[89] In other words, because the actions that would afford constructive notice to the record owner—residence, cultivation or im-

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87 *See, e.g.*, Klingel v. Kehrer, 401 N.E.2d 560, 563-64 (Ill. App. Ct. 1980). In this case, the record owner testified that he had never seen any stumps or other visible evidence of adverse possessor's claimed tree cutting activities on wooded parcel. In contrast, the adverse possessor testified that he had never seen any stumps or other visible evidence of the tree cutting activities that the record owner claimed he had conducted on the land (and which, if proven, would seemingly have precluded exclusivity).

88 *See, e.g.*, Knecht v. Spake, 346 P.2d 98, 101 (Or. 1959). Although the property owner was aware during the entire statutory period of an adverse claim to a large tract of "exceedingly wild" land and failed to bring suit, the court nonetheless required the adverse possessor to prove compliance with the wild lands standard. This was done through evidence of limited brush clearing, some wood cutting, picnicking and removal of several loads of leaf mold.

89 *See* 7 POWELL, *supra* note 5, § 1012[2] at 91-98; William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L.Q. REV. 532, 543 (1939).

provement—are difficult or expensive, they may be ignored. The adverse claimant is required only to do what is "reasonable" and "possible," even if this condemns the owner to ignorance.

b. *Acts of the owner*

The remaining assumption of the limitations model—that a reasonable owner either retains possession of his land or at least inspects it occasionally—has little application in the wild lands context. The belief that the owner of wild, undeveloped property holds "possession" in the classic sense is clearly a fiction. By definition, the traditional indicia of possession—residence, cultivation or improvement—are absent. How does a nonresident owner "possess" wild land? Possession must be found (if at all) in the owner's occasional visits, which do not significantly alter the natural character of the land. Under the limitations model, then, we might expect that the owner who periodically visits his wild land would meet this attenuated version of "possession," thus precluding the claimant from satisfying the exclusive possession requirement.

Yet the exclusivity standard applied to wild lands differs substantially from this expectation. An owner retains possession sufficient to preclude adverse possession only through visits that involve some productive use of the land, and not through visits for other purposes.[90] In substance, American courts appear to apply the wild lands standard in this context as well; if an owner sporadically uses his land for an economic purpose compatible with its character and location, then the activities of the adverse claimant will not be deemed exclusive.[91] In other words, an owner may shield his title from adverse possession by engaging in roughly the same activities that would establish adverse possession under the wild lands standard if performed by a claimant. In this way, the test for retaining title is remarkably similar to the test for obtaining title.

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90 *See infra* notes 91-97.

91 *See, e.g.*, Hutson v. Rush Creek Land & Livestock Co., 294 N.W.2d 374, 376 (Neb. 1980) (concluding that claimant who used property along river for both summer grazing and hunting could not adversely possess because owner had also used land for hunting; the court noted that an "inescapable corollary" of the standard for obtaining title by adverse possession was that the owner could retain title by using the property for "a purpose to which the land is adapted"); Butler v. Lindsey, 361 S.E.2d 621, 623 (S.C. Ct. App. 1987) (holding that claimant who used one acre tract on island for recreation could not adversely possess land since owner had used the land for hunting; the court noted that the owner's use was "consistent with the use to which the land may be put"); Rickel v. Manning, 369 S.W.2d 655, 657-59 (Tex. Civ. App. 1963) (finding that claimant who grazed livestock on 20 acres of "rough, mountainous terrain" could not adversely possess property because previous owners had cut timber from land two or three times each year, a purpose to which the land "was adapted").

Thus, the owner who occasionally uses her land for hunting,[92] trapping,[93] grazing[94] or removing timber[95] will prevent adverse possession. Notably, however, acts characteristic of an environmentally-conscious owner, such as camping[96] or other non-economic visits,[97] fail to constitute the possession necessary to defeat exclusivity. Consider the cases of *O1* and *O2*, each owning identical 500 acre forest tracts. Assume that *O1* uses the parcel for grazing a few days each year and *O2* camps on the land each summer for a week. Assume further that on both tracts of land *A*, an adverse claimant, engages in sporadic activities that are admittedly sufficient in quality and duration to establish adverse possession if exclusivity exists. If *O1* and *O2* each sue *A* in separate ejectment actions, the outcomes would differ. *O1* would win on the theory that he retained "possession" and thus precluded exclusivity. *O2* would lose because *A* supposedly "ousted" her to acquire exclusive possession. Why? The limitations model cannot explain these divergent results.

The second strand of this limitations model assumption—that a reasonable owner would visit his wild land at all, thus obtaining notice

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92 *See* Hutson v. Rush Creek Land & Livestock Co., 294 N.W.2d 374, 376 (Neb. 1980); Butler v. Lindsey, 361 S.E.2d 621, 623 (S.C. Ct. App. 1987).

93 *Cf.* Voisin v. Luke, 341 So. 2d 6, 10 (La. Ct. App. 1977) (holding that owner's trapping in "wet marsh" area precluded exclusivity for prescription); Cofer v. Kuhlmann, 333 N.W.2d 905, 909 (Neb. 1983) (concluding that owner's acts of trapping, hunting and gathering fruit precluded exclusivity).

94 *See, e.g.*, Raftopoulos v. Monger, 656 P.2d 1308, 1311 (Colo. 1983) (en banc) (finding no exclusivity because owner used 120 acre parcel of range land for three to 15 days each year for sheep grazing); Werner v. Brown, 605 P.2d 1352, 1355 (Or. Ct. App. 1980) (finding no exclusivity because owner used parcel of "open range" for grazing); Farella v. Rumney, 649 P.2d 185, 186-87 (Wyo. 1982) (finding no exclusivity because owner used parts of 80 acre tract for occasional grazing); Rutar Farms & Livestock, Inc. v. Fuss, 651 P.2d 1129, 1134 (Wyo. 1982) (finding no exclusivity because owner used 31 acres of "poor" land for cattle grazing).

95 *See, e.g.*, Dees v. Pennington, 561 So. 2d 1065, 1068 (Ala. 1990) (finding no exclusivity because owner occasionally cut timber from disputed strip); Drennen Land & Timber Co. v. Angell, 475 So. 2d 1166, 1172-73 (Ala. 1985) (finding no exclusivity because owner of "predominantly timberland" sporadically cut timber); Sears v. State Dep't of Wildlife Conservation, 549 P.2d 1211, 1213 (Okla. 1976) (finding no exclusivity because owner of 20 acre forest parcel occasionally removed trees); Rickel v. Manning, 369 S.W.2d 655, 658 (Tex. Civ. App. 1963) (finding no exclusivity because owner cut timber on 20 acres of "rough, mountainous terrain" two or three times each year).

96 *See, e.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 831 n.16 (Alaska 1974) (concluding that overnight campouts sponsored by owner, a girl scout organization, were insufficient to preclude exclusivity).

97 *See, e.g.*, Pueblo of Santa Ana v. Baca, 844 F.2d 708, 713 (10th Cir. 1988) (holding that occasional visits by owner family to 131 acre tract were insufficient to preclude exclusivity in adverse claimant who used property for grazing and implying that no exclusivity would exist if owner family had also used land for grazing); Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 831 n.16 (Alaska 1974) (determining that occasional visits by adult volunteers working for owner girl scout council were insufficient to preclude exclusivity); Terry v. Timmons, 578 P.2d 405, 408 (Or. 1978) (stating that owner visits to forest parcel were insufficient to preclude exclusivity).

of an adverse claim—is also subject to dispute. Certainly, the owner of developed property would be expected to be present on the land occasionally. Land devoted to farming, for example, typically requires the physical presence of the landowner or farmworkers. The same analysis cannot reasonably apply to wild land; almost by definition, wild land is rarely visited. We would expect the owner of a remote desert tract with no immediate economic value to visit the property infrequently, if at all.[98] In particular, preservationist owners, such as conservation organizations, land trusts and other private owners who are motivated by the desire to protect wild land, may affirmatively minimize or avoid visitation. The presence of humans on such lands is ultimately inconsistent with complete preservation.[99] Thus, the visitation assumption inherent in the limitations model is inconsistent with the actual practice of owners of wild land.

Finally, even assuming that such a visit occurred, it is quite possible that the owner would not obtain notice of threatened adverse possession. Isolated locations, large sizes and irregular topography typically characterize tracts of wild lands. Consider a 100 acre wetland parcel owned by *O*. Assuming *O* occasionally visited the land, it is unlikely that she would conduct the type of inspection necessary to detect evidence of adverse possession, particularly given the low threshold of the wild lands standard.[100] Even if physical traces of the adverse claimant's activities, such as tree stumps or partially grazed undergrowth, remained on part of the tract, *O* still might fail to discover them.[101] Assuming *O* did discover such physical traces, she would probably view them as remnants of trespass, not as indications of a title claim.[102]

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98 *See, e.g.*, Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826, 831 (Alaska 1974) (noting that true owner used "semi-wilderness" property on occasion for overnight camping trips). Indeed, in some instances the true owner may have difficulty even locating the property without incurring the expense of a survey. *See, e.g.*, Bergen v. Dixon, 527 So. 2d 1274, 1278 (Ala. 1988) (finding adverse possession in case where true owners of 16 forest acres attempted to visit the property twice, but were unable to find it, even though adverse possessor's use of the land probably would not have been visible in any event).

99 *See generally* RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 263-73 (1973) (discussing the irony that intensive human recreational use of natural lands destroys their wilderness values).

100 *Cf.* Horn v. Lawyers Title Ins. Corp., 557 P.2d 206, 207 (N.M. 1976) (noting that agent of buyer of 116,000 acre tract of desert and grasslands flew over tract in airplane before purchase, but did not discover adverse possessor, whose acts included seasonal cattle grazing, seasonal cultivation and weekend visits; buyer's attempt to inspect tract by car was blocked by snow).

101 *See, e.g.*, Klingel v. Kehrer, 401 N.E.2d 560, 563 (Ill. App. Ct. 1980) (noting that record owner testified that he never saw stumps or other traces of timber removal activity claimed by adverse possessor).

102 Judging from the surprise that the adverse possession doctrine creates in first year law students, one may reasonably surmise that most Americans are likewise unfamiliar with

In sum, from the standpoint of the owner's acts, adverse possession of wild lands is not compatible with the limitations model.

B. An Alternative Explanation: The Development Model

Adverse possession law in the wild lands context is best explained not by the limitations model, but by the development model. Under the development model, adverse possession functions to facilitate the economic exploitation of land. This model mirrors the historic American view that forests, wetlands, grasslands, deserts and other lands in natural condition contribute nothing to the social welfare until they are converted to economic use.[103] Accordingly, this model is inherently hostile to the preservation of wild lands. Under the development model, title to wild lands can be maintained only through progressive exploitation. For example, to protect title the owner of forest property must utilize the land as would the reasonable economically-motivated owner of similar property, through timber harvesting, grazing or the like.[104] Failure to do so creates the risk that title will be transferred involuntarily to a claimant who has placed the property in active economic use.[105] Thus, the environmentally-conscious owner who seeks to protect the natural condition of his property may lose title to a despoiling claimant.

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the doctrine. *See infra* note 279. Thus, even if *O* saw visible traces of an adverse possessor, he would be unlikely to attribute legal significance to them.

103 For an excellent examination of the traditional American view of wilderness lands, see NASH, *supra* note 99. The tenor of the times is summarized in Nash's comment that the "reduction of the amount of wilderness defined man's achievement as he advanced toward civilization." *Id.* at 10.

104 *See supra* notes 91-95 and accompanying text.

105 Adverse possessor activities that do not meet the minimum level of economic use appropriate given the nature and location of the property are, by contrast, insufficient. *See, e.g.*, Reynolds v. Henson, 105 So. 2d 679, 680 (Ala. 1958) (finding mere execution of timber deed on four acre parcel was insufficient for adverse possession); Robinson v. Myers, 244 A.2d 385, 389 (Conn. 1968) (holding occasional visits, squirrel hunting and removal of old cars from 26 acre wooded parcel were insufficient for adverse possession); Ryan v. Arneson, 422 N.W.2d 491, 492 (Iowa 1988) (finding that cutting six trees and occasionally allowing cattle to wander onto 20 acre wooded parcel were insufficient for adverse possession).

1. *The Evolution of the Development Model*

Early American courts adjudicating adverse possession claims generally[106] followed the limitations model acquired from England.[107] The assumptions of this model were at least partly suited to the semideveloped character of the original thirteen states. Most of the three million inhabitants[108] were concentrated in a 100 mile wide coastal strip running from southern Maine to Georgia that was largely cleared for cultivation,[109] conditions somewhat analogous to those in England.

As was the case in England, the cornerstone of these first decisions was notice. Permanent, physical evidence of an adverse claim through residence, fencing or cultivation was required to ensure notice to owners who visited their lands.[110] Representative of the era was

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106 In contrast, property law during the early colonial period often preferred the possessor of land over the holder of legal title. Reflecting the need to populate the North American continent, royal grants in the 1600s and 1700s typically required that the grantee settle and cultivate the property. *See* Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 674-75 (1982). Property rights of the era thus "tended to be protected only to the extent of cultivation and fencing (a recurring symbol of use)." *Id.* at 675. The owner who failed to cultivate or otherwise use his land might lose it to an adverse possessor. *See, e.g.*, Colcord v. Bouter (1672), Essex Rec. MS, V, 100 (holding true owner lost title to meadow to two claimants who had been cutting wild grass on the land for "twelve or fourteen years"), cited in David T. Konig, *Community Custom and the Common Law: Social Change and the Development of Land Law in Seventeenth-Century Massachusetts*, 18 AM. J. LEGAL HIST. 137, 169 (1974).

107 *See generally* CALLAHAN, *supra* note 5, at 47-53 (summarizing the history of adverse possession in England, which closely follows the limitations model).

108 The population of the American colonies exceeded 3,000,000 by the time of the revolution; this density placed "great pressures on the land." COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 16TH ANNUAL REPORT 32-33 (1985) [hereinafter 16TH CEQ REPORT]. The British Government had restricted settlement west of the Allegheny Mountains through the Proclamation Line of 1763, which concentrated the population along the Atlantic strip. *Id.* It is reasonable to assume that the population density along the Atlantic strip was between about 30 and 35 persons per square mile, based on a total population of 3,000,000 confined to a strip measuring about 100 miles wide and 900 miles long. Although less than the population density of England (approximately 88 persons per square mile as of 1650), it nonetheless indicates a largely settled region. *See* BEST, *supra* note 24, at 2. In such a region, applying the English limitations model made a certain amount of sense. The limitations model also reflected the continued reverence for secure private property rights as a source of political liberty, which was characteristic of the post-Revolutionary era.

109 *See* 16TH CEQ REPORT, *supra* note 108, at 32. Approximately one-half to three-quarters of this strip had been cleared. *Id.* In the South, 40% to 50% of the land was in cultivation, compared with 5% to 15% of the land in the North. *Id.*

110 *See, e.g.*, Proprietors of the Kennebeck Purchase v. Springer, 4 Mass. 416, 418-19 (1808) (finding that cutting of natural grass and marking boundaries were insufficient for adverse possession because these actions would not afford notice to owner). The court in Grant v. Winborne, 3 N.C. (2 Hayw.) 56 (1798), elaborated on the importance of notice:

> The law has fixed the term of seven years [for adverse possession] both for the benefit of the prior patentee and the settler, that the latter might not be disturbed after that time, and in that time the prior patentee might obtain notice of the adverse claim and assert his own right. Hence arises the

a 1796 North Carolina decision, which held that merely grazing cattle in forested land would not constitute adverse possession because this was not "possession as is calculated to give notice."[111] The court commented that "fair notice" would be given "if a man settles upon the land . . . and continues that possession, builds a house or clears the land."[112] Embedded in the law of the Atlantic coastal states, the limitations model[113] persisted there[114] into the twentieth century.[115]

The new nation also inherited ownership of a huge tract of wild lands stretching roughly from the Appalachian Mountains to the Mis-

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> necessity that the possession should be notorious and public, and, in order to make it so, that the adverse claimant should either possess it in person or by his . . . servants or tenants; for the feeding of cattle or hogs, or building hog-pens or cutting wood from off the land may be done so secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all these are but acts of trespass. Whereas, when a settlement is made on the land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own.

Id. at 57.

111 Andrews v. Mulford, 2 N.C. (Hayw.) 311, 320 (1796).

112 *Id.*

113 The same conditions that impeded the growth of the development model in the Atlantic coastal states may have also contributed to the statutes establishing the adverse possession periods. States on the Atlantic Coast tend to require a much longer period than elsewhere, ranging from 25 years (Pennsylvania) to 20 years (Delaware, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey and North Carolina) to 15 years (Connecticut, Vermont and Virginia), while most other states require shorter periods of 10, seven and even five years. *See* 7 POWELL, *supra* note 5, ¶ 1014[1] (listing statutory periods required by various states).

114 North Carolina, however, was an exception to this rule. Well before Ewing v. Burnet, 36 U.S. (11 Pet.) 41 (1837), North Carolina had adopted its own use-based standard for adverse possession. *See* cases cited *infra* note 138. The best early description of this standard is found in Williams v. Buchanan, 23 N.C. (1 Ired.) 535 (1841). In allowing adverse possession of a stream bed based on seasonal placement of fish traps and construction of a small dam, the court noted:

> Possession of land is denoted by the exercise of acts of dominion over it, in making the ordinary use and taking the ordinary profits, of which it is susceptible in its present state—such acts to be so repeated as to show that they are done in the character of owner, and not of an occasional trespasser.

Id. at 540. The *Williams* standard ultimately helped shape Tennessee law as well. *See* Copeland v. Murphey, 42 Tenn. (2 Cold.) 64, 71-72 (1865); West v. Lanier, 28 Tenn. (9 Hum.) 762, 770 (1849).

115 Thus, for example, Massachusetts, New York, Pennsylvania, South Carolina and Virginia retain in varying degrees a comparatively strict approach to adverse possession of wild lands. *See supra* note 47. Others, such as Connecticut, Delaware and Vermont, adopted the wild lands standard in the twentieth century. *See supra* notes 51, 53.

sissippi River.[116] Following the Land Ordinance of 1785,[117] the federal government sold huge tracts, often to speculators,[118] both to raise the revenue urgently needed to repay debts and to encourage western settlement.[119] Eventually through the Louisiana Purchase, the United States acquired most of the land between the Mississippi River and the Rocky Mountains.[120] By 1803 more than ninety percent of the nation consisted of sparsely populated, publicly owned wild lands. The broad federal policy toward these wild lands was to transfer them into private ownership, initially through sale.[121] Because the government had never been able to enforce its theoretical ban against squatting on these lands,[122] sales often resulted in conflicts between new absentee owners holding legal title and actual settlers who had already placed the land in productive use.[123] During the early nineteenth century

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116 *See* 16TH CEQ REPORT, *supra* note 108, at 33. The post-Revolutionary era produced bitter debate among the new states concerning ownership of lands west of the Appalachians. GATES, *supra* note 29, at 49-57. Massachusetts, Connecticut, New York, Virginia, North Carolina, South Carolina and Georgia all held extensive claims to western lands, which were disputed by the remaining states on the basis that the western lands should be the property of the whole nation. *Id.* at 49-51. These western land claims were progressively ceded to the federal government between 1781 and 1802. *Id.* at 51-57.

117 Land Ordinance of 1785, *reprinted in* 2 THE TERRITORIAL PAPERS OF THE UNITED STATES 12 (Clarence E. Carter ed., 1934).

118 The federal government generally encouraged purchases of large tracts by speculators on the theory that these buyers would in turn resell smaller parcels to settlers. Significantly, the term "speculator" had not yet acquired a negative connotation. George Washington, for example, owned over 32,000 acres in the Ohio Territory in the late 1700s, and was so enraged by squatters that he suggested they be considered "fit subjects for Indian vengeance." GATES, *supra* note 29, at 70 n.28. As late as 1819, in Brown v. Gilman, 17 U.S. (4 Wheat.) 255 (1819), a case dealing with the purchase of 11,000,000 acres of "unsettled and uncultivated lands" in the Mississippi Territory for resale to settlers, the Supreme Court warned that "the great objects of the speculation would be materially impaired . . . by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain." *Id.* at 297.

119 *See* GATES, *supra* note 29, at 59-74 (discussing the nature and impact of the Land Ordinance of 1785); 16TH CEQ REPORT, *supra* note 108, at 34-35 (same).

120 *See generally* GATES, *supra* note 29, at 77-79 (describing the acquisition of the Louisiana Territory).

121 *See generally* 16TH CEQ REPORT *supra* note 108, at 34-35 (discussing distribution of the public lands). *See also* GATES, *supra* note 29, at 59-247 (providing an excellent overall treatment of early federal efforts to dispose of public lands).

122 Although Congress prohibited squatting on public lands as early as 1783, it was never able to enforce this ban. Settlers expelled from their farms in the Ohio Territory by government troops in 1785, for example, returned as soon as the troops were withdrawn. GATES, *supra* note 29, at 67. In 1841, finally bowing to the inevitable, Congress expressly allowed squatting anywhere on the surveyed public lands. *Id.* at 68.

123 *See, e.g.*, Green v. Liter, 12 U.S. (8 Cranch) 229 (1814). In *Green*, the Court honored the superior legal title of the absentee owner despite the adverse possession claim of the settler in possession. Interestingly, the absentee owner had never held actual possession of the land and thus had never held seisin in the usual sense. The adverse claimant argued that because the owner had not actually been disseised, he could not sue in ejectment. To protect the legal title holder, the Court relied on the fiction that he held "constructive seisin" merely by virtue of his legal title, because wilderness conditions of distance, topography and "hostile Indians" rendered prior possession impractical. *Id.* at 245-49.

the goal of national development through rapid settlement progressively eclipsed the concern for revenue, although sales to speculators continued.[124]

In the same era, the American judiciary began its well-documented shift from formalism toward instrumentalism.[125] American legal theory had previously limited the judicial function to the application of static common law. Conscious that the common law was mutable, judges of this era recognized that the law could serve as an instrument of change. They embraced this activist role, and began manipulating the common law to implement social and economic policy, a process chronicled by Willard Hurst,[126] Morton J. Horwitz,[127] and others.[128] Instrumentalist judges increasingly sacrificed traditional legal rules in the name of economic growth.[129]

In the context of property law, the most profound consequence of this transition was the new importance placed on land development.[130] Historically, the common law had reflected a strong anti-development bias,[131] mirroring the largely agricultural society in which it functioned. Confronted with the need to retool legal principles to facilitate economic growth, American judges increasingly developed rules that would encourage settlement—and thus productive economic use—of the nation's abundant wild lands.[132] Justice Story expressed the sentiment of the era in an 1829 Supreme Court deci-

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124 *See* 16TH CEQ REPORT, *supra* note 108, at 35.

125 *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

126 *See* HURST, *supra* note 125.

127 *See* HORWITZ, *supra* note 125.

128 *See, e.g.*, Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1 (describing the rise of instrumentalism); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974) (same).

129 *See* Nelson, *supra* note 128, at 519-25; HORWITZ, *supra* note 125, at 32-24.

130 *See* HORWITZ, *supra* note 125, at 31 (describing the transformation from a "static agrarian conception" to a "dynamic, instrumental, and more abstract view of property which emphasized the newly paramount virtues of productive use and development"); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 412-13 (2d ed. 1985) (discussing generally the changing attitude toward land use).

131 *See generally* HORWITZ, *supra* note 125, at 32-33.

132 The changing judicial attitude toward waste illustrates this trend. In Pynchon v. Stearns, 52 Mass. (11 Met.) 304 (1846), for example, the Supreme Judicial Court of Massachusetts rejected the rigid English rule as to what would be considered waste, noting that "if universally adopted in this country, [it] would greatly impede the progress of development." *Id.* at 312. In the process, the court ignored earlier American decisions that had followed the English rule. *See* Nelson, *supra* note 128, at 521-22. For a discussion of the impact of instrumentalism on the law of waste, see HORWITZ, *supra* note 125, at 54-56.

sion: "The country was a wilderness; and the universal policy was to procure its cultivation and improvement."[133]

Absentee landowners were anathema to the economic development of land, which could be accomplished only by actual settlers.[134] Development of wild land by a settler—however slight—was preferable under this view to the complete disuse which accompanied speculative ownership.[135] With increasing disputes between absentee legal owners and settlers of wild land,[136] the stage was set for a realignment

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133 Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 145 (1829). The writings of Alexis de Tocqueville provide useful insights into the American attitude toward wild land at the time. Reflecting on his visit to the Michigan Territory in 1831—purposely undertaken to experience a wilderness area—de Tocqueville wrote that Americans:

> are insensible to the wonders of inanimate nature and they may be said not to perceive the mighty forests that surround them till they fall beneath the hatchet. Their eyes are fixed upon another sight . . . [the] march across these wilds, draining swamps, turning the course of rivers, peopling solitudes and subduing nature.

2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 74 (Phillips Bradley ed., 1945). Roderick Nash retrospectively expresses the same sentiment:

> Insofar as the westward expansion of civilization was thought good, wilderness was bad. It was construed as much a barrier to progress, prosperity and power as it was to godliness. On every frontier intense enthusiasm greeted the transformation of the wild into the civilized. Pioneer diaries and reminiscences rang with the theme that what was "unbroken and trackless wilderness" had been "reclaimed" and "transformed into fruitful farms and . . . flourishing cities . . . ."

NASH, *supra* note 99, at 40.

134 *See* GATES, *supra* note 29, at 211. Indeed, early settlers regarded potential speculators as "intruders who would seriously retard the growth of the area for years by withholding land from development while they waited for its value to rise." *Id.* at 149. Settlers in some regions tried to discourage speculation by pasturing their livestock on, or removing timber from, absentee-owned land; others convinced local government to raise tax assessments on such land in the hope of creating delinquencies, and thus expediting the transfer of title through sale to actual settlers. *Id.* at 150.

135 Representative of this viewpoint, Thomas Jefferson stressed the importance of settling uncultivated land as an issue of natural right. He wrote to James Madison:

> Whenever there are in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on. If for the encouragement of industry we allow it to be appropriated, we must take care that other employment be provided to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed.

Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* THOMAS JEFFERSON—WRITINGS 841-42 (Merrill D. Peterson ed., 1984); *see also* GATES, *supra* note 29, at 149-50 (discussing settlers' antagonism toward speculators who allowed land to remain unused); Lynton K. Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 765 (1974) (discussing Jefferson's view that uncultivated land should be made available for settlement).

136 *See* GATES, *supra* note 29, at 121-76. One major tension between settlers and speculators, for example, stemmed from the procedures used in federal land sales. Between 1800 and 1820, public lands were largely sold on credit; a settler who failed to make the payments required by his contract forfeited the property (and the improvements upon it), which could then be resold to absentee speculators. *Id.* at 142-43. The federal government's use of cash sales between 1820 and 1840 produced similar problems. Settlers of the

of their respective legal rights. The evolution of adverse possession from the limitations model toward the development model reflected the emerging judicial concern for economic growth at the expense of traditional legal rules.[137]

The metamorphosis began[138] in 1837 with the watershed decision by the United States Supreme Court in *Ewing v. Burnet*.[139] The case involved a steep Ohio lot, cut with deep gullies, whose "principal use and value was in the convenience of digging sand and gravel."[140] Sued in ejectment by the record owner, the adverse claimant conceded that he had never resided upon, improved or cultivated the property; instead, the claimant argued that his intermittent acts over the required twenty-one year period, including removing sand and gravel, leasing such rights to others and prosecuting trespassers, were sufficient to constitute adverse possession because such activities were all that the condition of the land allowed. The record owner asserted the traditional argument that such sporadic, temporary activities were consistent with a mere trespass and did not allow "all the world to know" of the adverse claim as would the erection of a fence or other improvement; he argued that if the rule that the defendant espoused was applied to "wild land . . . no man can safely own such property."[141] This argument appears somewhat disingenuous under the facts of this case, because the plaintiff's predecessor-in-interest had actual notice of the adverse claim during the entire twenty-one year period required for adverse possession, but had failed to file suit.[142] Whether the defendant's activities provided sufficient constructive notice under the limitations model was apparently not an issue.

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era often occupied, improved or used public lands before they were available for purchase at government auctions, only to be later outbid by speculators when auctions occurred; settlers were not accorded preemptive rights to purchase. *Id.* at 152-57. In each situation, the settler might have retained possession and use of the land even though legal title was vested in the absentee speculator.

137 *See* Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring and dissenting) (noting that adverse possession law was developed "when much of the continent was unsurveyed wilderness" such that "courts adopted a public policy that as much land should be put to use as possible"); *cf.* FRIEDMAN, *supra* note 130, at 413-14 (observing that adverse possession was "eagerly embraced" in the United States and commenting that it "seemed to favor settlers over absentee owners" in many instances).

138 As early as 1831, for example, one North Carolina court began moving away from the focus on notice, commenting in dicta that sufficient possession could be found through the use of wetlands in their natural state. It noted that "exercising that dominion over the thing, and taking that use and profit which it is capable of yielding *in its present state*, is a possession." Simpson v. Blount, 14 N.C. (1 Dev.) 34, 36-37 (1831). Three years later, another North Carolina court adopted this rule, holding that the periodic cutting of naturally growing grass in a meadow was sufficient for adverse possession. Burton v. Carruth, 18 N.C. (3 & 4 Dev. & Bat.) 2 (1834).

139 36 U.S. (11 Pet.) 41 (1837).

140 *Id.* at 49.

141 *Id.* at 47.

142 *Id.* at 49.

Yet, in *Ewing* the Court largely ignored the existence of actual notice and focused on the nature of the adverse claimant's activities. It rejected the view that actual occupation, cultivation or improvement was required.[143] The Court held instead that the activities necessary for adverse possession hinged on "the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it."[144] The Court then established a special rule allowing adverse possession

> when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.[145]

Under this new standard for wild lands, the defendant's actions sufficed to establish adverse possession of "a valuable sand bank."[146]

Ewing heralded the birth of the development model. The Court jettisoned the traditional notice indicia of residence, cultivation and improvement. The sufficiency of the adverse claimant's actions on wild lands was to be measured not with the yardstick of constructive notice, but with that of economic use. The property itself was considered a commodity, described not merely as a lot, but rather in terms of its productive worth. The picture painted by the Court in *Ewing* contrasted the predecessor owner, who knowingly failed to exploit this resource, with the adverse claimant, who had been actively "using and selling the sand" for more than twenty-one years.[147]

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143 The Court had expressed this view in dicta a year earlier in Ellicott v. Pearl, 35 U.S. (10 Pet.) 412 (1836), upholding adverse possession of a 1000 acre tract of forested land where the claimant had occasionally tapped trees to obtain sap for sugar production, but had not actually resided on or improved the land. *Id.* at 433.

144 Ewing v. Burnet, 36 U.S. (11 Pet.) 41, 53 (1837). An interesting facet of this decision is the minor attention paid to the actual notice received by the owner's predecessor, a nuance which illustrates the weakness of the limitations model. If the purpose of the adverse possession requirements is to afford constructive notice, why should a court insist that they be met if the true owner has actual notice? By considering the nature and extent of the adverse claimant's activities on the land, the *Ewing* court undercuts the rationale of the limitations model.

145 *Id.* at 53. Taken literally, this "public acts of ownership" language implies that adverse possession might be effected without actual development of the property, for example, by orally asserting an ownership claim in the presence of neighbors, encumbering the property with a mortgage or bringing lawsuits concerning the property. In the wake of *Ewing*, however, almost all courts refined this language to require public acts of economic use on the land itself, although public acts other than use were occasionally used to buttress adverse possession findings. *See, e.g.*, Kayser v. Dixon, 309 So. 2d 526, 529 (Miss. 1975) (holding cutting timber, cattle grazing, painting boundary line on trees sufficient "public" acts); McCaughn v. Young, 37 So. 839, 842 (Miss. 1905) (holding cutting timber, together with execution of mortgages, efforts to sell and payment of taxes sufficient "public" acts).

146 Ewing v. Burnet, 36 U.S. (11 Pet.) 41, 53 (1837).

147 *Id.*

Because state law governs adverse possession, the precedential impact of *Ewing* was limited to Ohio. As a Supreme Court decision, however, many courts viewed it as a persuasive authority, particularly in the states west of the Appalachian Mountains, where precedent was scant and, correspondingly, common law was fluid.[148] While occasionally paraphrasing the standard (and melding it with other similar approaches),[149] state courts ultimately cited *Ewing* for the rule that the acts required for adverse possession turned on the nature and character of the land and the uses to which it was adapted, so that a lesser quality and quantity of activity was required for undeveloped lands. Within roughly two decades, *Ewing* was shaping the adverse possession law of Georgia,[150] Illinois,[151] Mississippi,[152] Missouri,[153] and Tennessee.[154]

By the end of the nineteenth century, most states had adopted this wild lands standard through decisions ultimately attributable to

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148 This process was facilitated by nineteenth century real property treatises which dutifully recited the *Ewing* standard together with the inconsistent pre-*Ewing* rules, making little effort to reconcile the two. *See, e.g.*, JOSEPH K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY 400-03, 411-12 (6th ed. 1876) (mentioning both standards); HENRY F. BUSWELL, THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION 348-49 (1889) (mentioning both standards).

149 The most important of these stems from North Carolina, where state courts even before *Ewing* had allowed adverse possession in the absence of residence, improvement or cultivation. *See supra* note 138 and accompanying text. These cases coalesced into a standard focusing on whether the adverse claimant made the "ordinary use" suitable for the land and received the "ordinary profits" it generated. *See* Williams v. Buchanan, 23 N.C. (1 Ire.) 402 (1841). This "ordinary use/ordinary profits" thread later surfaced in, inter alia, Colorado, Iowa, Oklahoma and Wisconsin. *See* Anderson v. Cold Spring Tungsten, Inc., 458 P.2d 756 (Colo. 1969); Booth v. Small, 25 Iowa 177 (1868); Collier v. Bartlett, 175 P. 247 (Okla. 1918); Burkhardt v. Smith, 115 N.W.2d 540, 543-44 (Wis. 1962).

150 Royall v. The Lessee of Lisle, 15 Ga. 545, 547-48 (1854).

151 Morrison v. Kelly, 22 Ill. 610, 623-24 (1859). Although cited extensively in *Morrison*, the *Ewing* standard was not necessary for the result. Nonetheless, the standard found its way into the fabric of Illinois law in Truesdale v. Ford, 37 Ill. 210 (1865), which in turn was cited in Kane v. Footh, 70 Ill. 587 (1873) (finding adverse possession based solely on grazing).

152 Ford v. Wilson, 35 Miss. 490, 505 (1858) (finding adverse possession based on clearing and cultivation, despite destruction of fence by fire).

153 Menkens v. Ovenhouse, 22 Mo. 70, 74-75 (1855) (finding periodic cutting of wood and timber sufficient for adverse possession).

154 West v. Lanier, 28 Tenn. (9 Hum.) 762, 770 (1849). *West* in turn served as authority in Copeland v. Murphey, 42 Tenn. (2 Cold.) 64 (1865) (adverse possession of 25 acres of timberland based on use of timber for firewood and fence rails, among other things).

Ewing.[155] Despite judicial rhetoric and landowner frustration,[156] the resulting adverse possession decisions evidenced little concern for constructive notice. Before the century closed, for example, 320 acres of unenclosed California rangeland were adversely possessed through seasonal sheep grazing;[157] eighty acres of "barren sand hills and sloughs" in Indiana were adversely possessed through berry picking and timber cutting;[158] and forty forested acres in Michigan were adversely possessed through removing timber and occasional pasturing.[159] From the vantage point of 1905, the Mississippi Supreme Court explained that the former rule requiring occupancy, improvement or cultivation had been "gradually relaxed" as to wild lands because this requirement was "impracticable, if not impossible" to meet.[160]

Despite increasing concern for preservation, the momentum of the development model continues as the twenty-first century approaches.[161]

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155 *See, e.g.*, Bell v. Denson, 56 Ala. 444, 449 (1876) (stating that "possession must be by acts suitable to the character of the land"); Mooney v. Cooledge, 30 Ark. 640, 655 (1875) (concluding that "much depends on the nature of the situation of the property, and the use to which it can be applied"); Brumagim v. Bradshaw, 39 Cal. 24, 46 (1870) ("[T]he acts of dominion must he adapted to the particular land, its condition, locality and appropriate use."); Worthley v. Burbanks, 45 N.E. 779, 781 (Ind. 1897) (observing that "much depends on the nature and situation of the property, the uses to which it can be applied"); Bowen v. Guild, 130 Mass. 121, 123 (1881) (noting that acts must be suitable to "the character of the land, and the purposes to which it is adapted"); Murray v. Hudson, 32 N.W. 889, 891 (Mich. 1887) (finding use of forest as woodland "in the usual and ordinary way" sufficient). Echoes of *Ewing* may also he found, without attribution, in the rules quoted in Saxton v. Hunt, 20 N.J.L. 487 (1845), and Webb v. Richardson, 42 Vt. 465 (1869).

156 Thus, for example, owners of large tracts of undeveloped land, particularly railroads operating in the West, confronted increasing problems with squatters asserting adverse possession claims in the 1870s. *See* Mix, *supra* note 32, at 250-54. To create a new mechanism to ensure notice of such claims (apparently because the common law adverse possession elements did not provide adequate notice), they lobbied in some states for legislation that would require the payment of property taxes as an element of adverse possession. *Id.* In theory, the adverse possessor's tax payments would create a public record of his claim, which the owner could then discover through record inspection. While a minority of states ultimately enacted such legislation during the decade, it proved ineffective as a notice mechanism, essentially due to restrictive judicial interpretation. *Id.* at 253; *see also* Barcus v. Galbreath, 207 P.2d 559, 564 (Mont. 1949) (holding that adverse possessor need not pay annual property tax installments as they became due, but rather could pay all accumulated back taxes at the end of the adverse possession period).

157 Webber v. Clarke, 15 P. 431 (Cal. 1887).

158 Worthley v. Burbanks, 45 N.E. 779 (Ind. 1897).

159 Murray v. Hudson, 32 N.W. 889 (Mich. 1887).

160 McCaughan v. Young, 37 So. 839 (Miss. 1905) (permitting the adverse possession of a "swamp woodland" based on occasional timber cutting).

161 For example, Utah and Wyoming first recognized seasonal grazing on unenclosed land as sufficient for adverse possession in 1950 and 1979, respectively. *See* Adams v. Lamicq, 221 P.2d 1037, 1039 (Utah 1950); D.A. Shores v. D.L. Lindsey, 591 P.2d 895, 900 (Wyo. 1979). The court in *D.A. Shores* relied heavily on seasonal grazing decisions from California such as Brumagim v. Bradshaw, 39 Cal. 24 (1870), which itself rested on the reasoning of *Ewing*. Also instructive is the modern experience of Idaho and New York,

2. *The Development Model in Modern Adverse Possession Doctrine*

From the perspective of the limitations model, American adverse possession law as applied to wild lands appears nonsensical. Its structure bears no relation to a notice-driven system; its operation results in the involuntary transfer of title based on activities quite unlikely to afford notice. If we postulate that adverse possession law is intended to stimulate the development of wild lands, however, both its overall structure and the outcome of individual cases are understandable.

a. *Acts of the adverse claimant*

Assume that adverse claimant *A* enters a 500 acre forest tract, clears the entire parcel and cultivates corn annually for the statutory period. Both the development and limitations models explain why adverse possession would result in this rare but easy case. Under the limitations approach, the clearance and cultivation afford constructive notice to a reasonable owner; under the development approach, the adverse possessor has placed the land in active economic use above and beyond the minimum required.[162] The typical wild lands adverse possession case, however, involves quite different facts. The adverse claimant frequently obtains title based on minor, intermittent acts, such as gathering firewood, cutting a few trees or occasionally grazing

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both members of the minority of states that require—in theory at least—residence, cultivation, improvement or related conspicuous actions for adverse possession. Increasingly, these constructive notice protections are being eroded. In Goff v. Shultis, 257 N.E.2d 882, 885 (N.Y. 1970), for example, adverse possession of 260 acres of wild forest land was established through the claimant's testimony that while he "used it for . . . recreation principally, for hunting." The claimant testified further that he had occasionally cut chestnut trees growing there for conversion into "stakes" and "fruit ties" for use on his farm eight miles away. *Id.*; *see also* Cluff v. Bonner County, 824 P.2d 115, 117 (Idaho 1992) (finding a question of fact whether hunting, fishing, camping, timber thinning, posting signs, and changing manner of creek flow once would suffice for adverse possession of "isolated timberland"); Tubolino v. Drake, 578 N.Y.S.2d 745, 746 (N.Y. App. Div. 1991) (finding adverse possession of 10 acre forest parcel based on hunting, fishing, walking, cutting some trees, building small culvert and repairing footbridge). Another possible indication of the continued momentum of the development model is found in a 1970 report issued by the federal Public Land Law Review Commission, which recommended generally that "the doctrine of adverse possession be made applicable against the United States [with respect to the public lands] where [the] land has been occupied in good faith." PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 261 (1970). For analyses of this controversial recommendation, see John R. Call, *Adverse Possession of Public Land: A Look at the Recommendation of the Public Land Law Review Commission*, 1971 LAW & SOC. ORD. 131; Elmer M. Million, *Adverse Possession Against the United States—A Treasure for Trespassers*, 26 ARK. L. REV. 467 (1973).

162 Some early decisions suggested that the increased availability of adverse possession would stimulate settlement of wilderness areas. *See, e.g.*, Grant v. Winborne, 3 N.C. (2 Hay.) 56, 57 (1798) (commenting that the early lack of adverse possession protection "tended to discourage the making of settlements, and of course, repressed population," because even an owner with color of title who had cleared and cultivated the land might be later ejected by one with superior record title).

sheep that are woefully insufficient to provide notice. The wild lands standard that compels this outcome has no connection to a notice-driven model. The development model, in contrast, explains both the result in the typical case and the overall standard.[163]

The wild lands standard both motivates and facilitates exploitative use. Successful adverse possession requires an economic use of such lands in a manner suited to their character and location. Accordingly, the claimant who is aware of the law is motivated to place the property in economic use to the extent reasonable given these factors.[164] Thus, if an economically reasonable use of remote forest property is cutting timber,[165] producing turpentine,[166] or extracting sap for maple syrup,[167] a rational claimant will engage in these activities.[168] This standard similarly motivates such a claimant to graze stock on grasslands, cut wild hay from meadows, extract sand from

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163 One could argue that these activities are also consistent with a good faith model. *See supra* text accompanying notes 47-85. Under this view, the acts that a normal owner would perform may be considered objective indicia of a good faith belief by the adverse possessor that he is the true owner. The good faith model, however, fails to explain the many decisions that have allowed bad faith adverse possession. These include the landmark *Ewing* case, in which the defendant successfully effected adverse possession even though he was informed before he began his activities that plaintiff had received a deed prior to his own. A contemporary example is Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992), in which the claimant was an employee of the county tax assessor's office. Learning through his employment that no one had paid property taxes on a parcel of "isolated timberland," and being aware of the law, he purposefully set out to adversely possess the land through hunting, fishing, camping, thinning the timber and paying taxes on it. Reversing the trial court's summary judgment in favor of the record owner, the Idaho Supreme Court determined that a question of fact existed as to whether the activities were sufficient given the "character of the land, its location, the uses to which it is usually put and all the circumstances bearing on that question." *Id.* at 117.

164 The intentional, bad faith adverse possessor is a modern reality. *See, e.g.*, Cluff v. Bonner County, 824 P.2d 115 (Idaho 1992) (noting that claimant attempted to adversely possess timberland tract to which he had no legal right after learning through his employment that taxes on it had not been paid); Pettis v. Lozier, 290 N.W.2d 215 (Neb. 1980) (observing that claimant aware of adverse possession doctrine intentionally undertook possessory activities to acquire title to land); *cf.* Estate of Stone v. Hanson, 621 A.2d 852 (Me. 1993) (holding that claimant to uncultivated island under special Maine statute, which recoguizes ownership to undeveloped lands based on payment of taxes for at least seven years by a claimant with a recorded deed, could acquire title under statute, even though he created the deed under which he claimed in a straw transaction).

165 *See supra* note 65 and cases cited therein.

166 *See, e.g.*, Broadus v. Hickman, 50 So. 2d 717, 720 (Miss. 1951) (allowing adverse possession of 60 forest acres based on lessee's turpentine operations, court noted that the "land could not be profitably cultivated, nor was it good pasture land, or suitable for occupancy as a residence, much of it being swampy and low").

167 *Cf.* Barnard v. Elmer, 515 A.2d 1209 (N.H. 1986) (finding sap extraction a partial basis for adverse possession of 90 acre forest tract).

168 The rational bad faith adverse possessor, of course, might well attempt to ensure that his efforts did not attract the attention of the true owner. *Cf.* Klingel v. Kehrer, 401 N.E.2d 560, 564 (Ill. Ct. App. 1980) (holding record owner lost woodland tract through adverse possession based on tree cutting despite his testimony that he never saw any stumps or other visible evidence of adverse possessor activity during his visits).

riverbanks, fish and hunt on wetlands and so forth.[169] From the pro-development perspective, permitting adverse possession in the individual case is desirable; the owner's entitlement is transferred to a claimant willing to exploit the land, as demonstrated by the claimant's conduct throughout the statutory period.

What about the typical claimant who is ignorant of adverse possession law until a dispute arises? Applied on behalf of the claimant whose actions were not intentionally tailored to satisfy the doctrine's requirements, the wild lands standard facilitates continued exploitation of land. Assume, for example, that *O*, the owner of a 1000 acre wetland tract, elects to preserve it. *A*, an adverse claimant, occasionally cuts timber from the property. *A* may successfully assert adverse possession under the development model because of her economic "track record." *A*'s actions demonstrate that, all other things being equal, she is more likely than *O* to devote the property to productive use in the future. Title through adverse possession is not bestowed on *A* to compensate her for her past activities, but to facilitate her continuation (and perhaps expansion) of this use. Again, the outcome in the typical case is understandable; substituting the industrious adverse possessor for the passive owner helps to ensure that the property will be developed at a rate consistent with its locale. In the race for economic development, the speedy claimant replaces the lagging owner.[170]

b. *Acts of the owner*

The exclusivity standard applicable to wild lands is similarly structured to facilitate development. Generally, if an owner uses his land for a productive purpose which suits its character and location, the activities of the adverse claimant are not deemed exclusive[171] and loss

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169 *See supra* notes 62-71 and accompanying text.

170 The importance of adverse possession in facilitating economic development is not unique to the American experience. Early Rome, for example, was heavily dependent on effective agriculture, and thus concerned with exploitative use of its limited land. The Twelve Tables, the earliest codification of Roman law dating from about 500 B.C., recognized the doctrine of *uscapio*, under which one could obtain a form of ownership of land by using it continuously for two years. *See* FRITZ SCHULZ, CLASSICAL ROMAN LAW 355 (1951). It is widely believed that in early Rome *uscapio* could be asserted even by a possessor who did not act in good faith. *See* W. W. BUCKLAND, A MANUAL OF PRIVATE ROMAN LAW 128-29 (1939). As Rome evolved into a commercially-oriented empire, however, *uscapio* became limited by the additional requirement that the occupant act in good faith. *Id.*

171 This theme runs through the exclusivity cases in the wild lands context. *See, e.g.*, Raftopoulos v. Monger, 656 P.2d 1308, 1312 (Colo. 1983) (noting owner's seasonal grazing "use to which the land was put was consistent with its arid character"); Hutson v. Rush Creek Land & Livestock Corp., 294 N.W.2d 374, 376 (Neb. 1980) (noting owner used land for "hunting, a purpose to which it was adopted"); Sears v. State Dep't of Wildlife Conservation, 549 P.2d 1211, 1213-14 (Okla. 1976) (rejecting state's adverse possession claim to 20 acre forest tract where true owner visited only once or twice a year to remove trees); Wer-

of title through adverse possession is avoided. In other words, the wild lands standard serves as the yardstick to measure the activities of both the claimant and the putative owner. Thus, sporadic owner activities such as hunting, grazing and timber removal[172] will typically prevent adverse possession. One court, for example, denied an adverse possession claim to 120 acres of natural grassland because the true owner had grazed sheep there between three and fifteen days each year, a use the court found "consistent with [the land's] . . . arid character and the speed with which a sizeable flock of sheep could deplete its vegetation."[173] An owner's noneconomic uses, however, do not preclude exclusivity, much in the same way that a claimant's noneconomic uses do not support adverse possession.[174]

Although this rule has no logical link to the limitations model, it is explained by the development model. The owner aware of adverse possession law is motivated to place her property in at least some minimal form of productive use.[175] Similarly, the owner who is ignorant of the law, but who has already placed his property in such use retains title; because the land is already being developed, there is no need to shift ownership to an adverse claimant. However, the owner who consciously retains her land in its natural condition or devotes it to noneconomic uses (such as personal recreation) is vulnerable to loss of title through adverse possession. Ultimately, the doctrine protects the exploitative owner or claimant; it threatens only the preservationist owner.[176]

In a broad sense, the owner of wild lands never holds absolute title. Rather, his title is always subject to what might be considered a condition subsequent of exploitation. The owner may be vulnerable to adverse possession if he fails to devote the land to an appropriate economic use. He must continually perfect his title through activities deemed suitable to the nature and character of the land.

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ner v. Brown, 605 P.2d 1352, 1355 (Or. Ct. App. 1980) (holding that owner's periodic grazing of livestock on unfenced tract precluded exclusivity).

172 *See supra* notes 92-95 and cases cited therein.

173 Raftopoulos v. Monger, 656 P.2d 1308, 1312 (Colo. 1983).

174 *See supra* notes 58, 96, 97.

175 Economic use by an owner which is extremely minor, however, will not meet this standard. *See, e.g.*, Overson v. Cowley, 664 P.2d 210, 218 (Ariz. Ct. App. 1982) (finding one visit by owner to 40 acre tract to cut a few fence posts insufficient); Bushey v. Seven Lakes Reservoir Co., 545 P.2d 158, 160-61 (Colo. Ct. App. 1975) (concluding that occasional entry by owner's employees to spray weeds and inspect reservoir was insufficient).

176 The abandoning owner, a third possibility, is also arguably threatened by adverse possession. But a more immediate (and preferable) solution to this problem is the loss of title through a forced sale following nonpayment of property taxes. *See infra* notes 293-95 and accompanying text.

II
THE DEVELOPMENT MODEL AND ENVIRONMENTAL PRESERVATION

Widespread public concern for the environment is a twentieth century phenomenon.[177] For most of this century, preservation of wild land such as forests, wetlands, deserts and grasslands was considered a purely governmental function, reflected in a network of national and state parks, wildlife refuges, wilderness regions and other protected areas.[178] Because government lands are largely immune from adverse possession, the application of the doctrine did not imperil these preserves.[179] In recent decades, however, private land preservation efforts have blossomed. Fueled by growing environmental concern[180] and frustration with government efforts,[181] individuals and organizations have increasingly embraced the market approach to preservation. As a result, over nine million acres of land—an area larger than the states of Massachusetts, Connecticut and Rhode Island combined—have been formally preserved by land trusts[182] and other

177 *See* NASH, *supra* note 99, at 200-62. The extent of modern environmental consciousness is demonstrated by a 1992 Roper Organization poll in which 81% of those surveyed identified themselves as either active environmentalists or sympathetic to environmental concerns; 15% were "neutral" and only 2% were unsympathetic. TIMES MIRROR MAGAZINES CONSERVATION COUNCIL, NATURAL RESOURCE CONSERVATION: WHERE ENVIRONMENTALISM IS HEADED IN THE 1990S 55 (1992) [hereinafter NATURAL RESOURCE CONSERVATION].

178 The federal government owns 730 million acres, about one-third of the land surface of the United States. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 15TH ANNUAL REPORT 249 (1984) [hereinafter 15TH CEQ REPORT]. Much of this land is shielded from consumptive use through inclusion in the National Park System (over 77 million acres), the National Wildlife Refuge System (90 million acres), federally designated Wilderness Areas (24 million acres) and other protected regions. *Id.* at 250-74, 634.

179 Land owned by the federal government is wholly immune from adverse possession under the maxim of *nullum tempus occurrit regi* —the statute of limitations does not run against the sovereign. *See, e.g.*, United States v. Vasarajs, 908 F.2d 443, 446 n.4 (9th Cir. 1990) (noting that "adverse possession cannot be achieved against the federal government"). *But see* the Color of Title Act, 43 U.S.C. § 1068-1068(b) (1988) (affording limited protection to good faith occupants of certain federal lands). The extent to which adverse possession may be asserted against state or local governments, in contrast, varies greatly among the states. *See generally* 7 POWELL, *supra* note 5, ¶ 1015 at 91-97 to 91-102 (discussing adverse possession claims against government entities).

180 For example, a nationwide 1992 Roper Organization poll concluded that, if forced to choose between environmental protection and economic growth, Americans would choose the former by a margin of 64% to 17%. *See* NATURAL RESOURCE CONSERVATION, *supra* note 177, at 55. Significantly, 59% of those surveyed felt that laws and regulations protecting "wild or natural areas" had not "gone far enough." *Id.* at 57.

181 Natural lands threatened with imminent development can be preserved only through rapid acquisition. Government land purchases, however, are hardly speedy. On the average, it takes approximately 10 years for the federal government to identify, study and designate land for acquisition. Paige St. John, *Grass-Roots Private Trusts Fill Gap in Wilderness Preservation*, L.A. TIMES, June 15, 1989, § 1, at 2. Land trusts and other private organizations, in contrast, can act much more quickly. *Id.*

182 Land trusts have protected more than 2,700,000 acres nationwide, an area twice the size of Delaware. *See* LAND TRUST ALLIANCE, 1991-92 NATIONAL DIRECTORY OF CONSERVA-

conservation organizations[183] through acquisition of fee simple title[184] or development rights.[185] Millions of additional acres have been protected privately and informally by individual owners oriented toward preservation.[186] While the political pressures spawned by deficits and tax burdens have slowed government preservation efforts, the rate of private activity has accelerated.[187] Lacking the shield of governmental

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TION LAND TRUSTS v (1991) [hereinafter NATIONAL DIRECTORY]. About 440,000 acres are owned directly by land trusts; the balance includes property on which such trusts hold easements as well as property acquired and resold to a government entity or private preservationist owner. *Id.* There are now at least 889 land trusts in the United States, most having been formed within the last 10 years, with a membership exceeding 770,000. *Id.* at v-vi. The scale of this effort is best demonstrated by two statistics: land trusts either own or control 1.15% of the land surface of Connecticut (35,941 acres out of 3.1 million acres) and 1.32% of the land surface of New Jersey (62,590 acres out of 4.7 million acres). *See* Constance L. Hays, *Vanguard In The Battle For Dwindling Open Space*, N.Y. TIMES, April 23, 1992, at B1.

183 For example, The Nature Conservancy, a national conservation organization devoted to the preservation of wild lands, has protected more than 6,300,000 acres—an area larger than the combined land surface of Connecticut, Delaware and Rhode Island. *See* THE NATURE CONSERVANCY, THE YEAR IN CONSERVATION—ANNUAL REPORT, back cover (1992) [hereinafter TNC 1992 REPORT]. In 1992 alone, it brought an additional 922,000 acres of wild lands under protection. *Id.* at 4. Much of this 1992 protection was effected through the purchase of fee simple title or development rights; examples include 2720 lake shore acres in North Dakota, 924 wetland acres in Florida, 267 acres of Georgia sand dunes, 4000 acres of rugged Minnesota land, and 19,000 riverside acres in Texas. *Id.* at 33-35, 38, 40, 47, 61. The Nature Conservancy also acquired land in 1992 through donations, including 235 riverside acres in Connecticut and 1000 acres of New Jersey wetlands. *Id.* at 32, 52.

184 For example, The Nature Conservancy alone owns fee simple title to over one million acres of wild lands in the United States. Chris Bolgiano, *Private Forests: The Lands Nobody Knows*, AMERICAN FORESTS, May/June, 1990, at 30. In one purchase, for example, it acquired a single New Mexico parcel consisting of 321,703 acres, over 500 square miles. *Id.*

185 *See* JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK (1988). *See also* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1981) (generally discussing the legal aspects of conservation easements). Land trusts, for example, hold conservation easements over 450,000 acres. *See* NATIONAL DIRECTORY, *supra* note 182, at v.

186 The extent to which individual owners hold title to wild lands for the purpose of preservation is unclear. Although acknowledging that individuals and other private owners have often chosen preservation, the Council on Environmental Quality reported difficulty in quantifying this practice because of "widespread and often small parcel ownership distribution" and ownership by "reticent, publicity-shunning individuals and families." 15TH CEQ REPORT, *supra* note 178, at 408. Yet, for example, 52% of the privately held land which the United States Forest Service considers "timberland" is owned neither by timber companies nor by farmers. *See* Bolgiano, *supra* note 184, at 31. One may reasonably infer that preservation motivates at least some of this ownership. Anecdotal evidence of individuals purchasing land for the purpose of preservation is common. *See, e.g.*, Logan D. Mabe, *Atlanta's Miracle Worker*, AMERICAN FORESTS, Jan./Feb., 1990, at 80 (discussing successful efforts of individual to save parcel of 200 year old white oak trees and other natural vegetation through $3,000,000 purchase). Preservation may also result from non-environmental motivations. A Council on Environmental Quality report, for example, profiled a land developer who had preserved portions of Hilton Head Island off the South Carolina coast as an amenity to insure "high property values and a prestigious reputation." *See* 15TH CEQ REPORT, *supra* note 178, at 402-08.

187 As early as 1984, the Council on Environmental Quality noted:

immunity, however, these formal and informal private preserves are vulnerable to adverse possession claims.[188]

American adverse possession law is inherently hostile to private preservation of these wild lands in both spirit and substance. Its ideology equates preservation with waste, reflecting an era when cleared land symbolized both civilization and economic progress. At a practical level, it imperils the ecological integrity of these private land preserves.

A. The Ideology of Exploitation

Implicit in the development model is the ideology of exploitative utilitarianism.[189] Wild lands are valued only for the material wealth that they can provide to humanity in the short term. Accordingly, a wild land tract is considered a commodity, as fungible and mundane

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> Shifting economic priorities, government deficits, and greater demands for a lessening of the tax burden on the private sector all suggest that the policies of recent decades, of primary reliance upon the public sector to protect and preserve the country's natural resources, will no longer be sufficient to the task. We will have to rely heavily upon private landowners and organizations to play a greater and greater role in protecting these resources.

15TH CEQ REPORT, *supra* note 178, at 364. Thus, by 1990 strategic purchases of undeveloped land by the federal government's Land and Water Conservation Fund had shrnnk to one-fourth of the level in the late 1970s. *See* Neal R. Peirce, *Land Trusts Keeping Bulldozers At Bay*, 22 NAT'L J. 1619 (June 30, 1990). This drop reflected a reduction in federal spending for new open-space acquisition from about $800 million in 1979 to about $200 million a decade later. *See* William Poole, *In Land We Trust*, SIERRA, Mar./Apr., 1992, at 52, 55. In contrast, the rate of preservation by conservation organizations is increasing. Between 1989 and 1991, for example, the total acreage of property protected by land trusts increased by almost 25%. *See* NATIONAL DIRECTORY, *supra* note 182, at v.

188 The common law in three states—Pennsylvania, Virginia and Wisconsin—renders adverse possession of wild lands quite difficult. *See supra* note 47 and accompanying text. In the ten states following the New York statutory model, which at least in theory requires acts of residence, cultivation, improvement or similar acts, adverse possession may be somewhat difficult. *See supra* note 47 and accompanying text. Any protection accorded to private preservation, however, is unintended. Only Massachusetts has purposely confronted the clash between adverse possession and environmental protection, and then only partially. In 1991, Massachusetts amended its adverse possession statute so that it would not apply to an action by a "nonprofit land conservation corporation or trust for the recovery of land or interests in land held for conservation, parks, recreation, water protection or wildlife protection purposes." *See* MASS. ANN. LAWS ch. 260, § 21 (Law. Co-op. 1992 & Supp. 1993). However, this section continues to allow adverse possession against other preservationist owners, including individuals. *Id.*; *see also* N.Y. ENVTL. CONSERV. LAW § 49-0305 (McKinney 1984 & Supp. 1994) (providing that adverse possession does not apply to New York conservation easements).

189 *See* Harold Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Alan E. Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 U.C.L.A. L. REV. 855 (1971); *see also* Caldwell, *supra* note 135, at 759 (discussing utilitarianism in the property context); Don J. Frost, Jr., Amoco Production Co. v. Village of Gambell and Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.: *Authority Warranting Reconsideration of the Substantive Goals of the National Environmental Policy Act*, 5 ALASKA L. REV. 15, 33-37 (1988) (same).

as an automobile, a pencil or an orange, destined for consumption.[190] Under this view, a tract of old growth forest might be seen as both a source of raw material for toothpicks and a promising site for a shopping center. To allow the forest to remain is to squander its value; to advocate preservation of the forest is to preach heresy.

The same spirit animated the familiar rule that property rights may be acquired by capture.[191] Confronted with a seemingly infinite supply of wild animals, minerals, water and other fugitive resources, early American courts seeking to stimulate economic development endorsed the ancient rule that capture created title.[192] Thus, wild animals were trapped,[193] oil and gas were extracted,[194] and water was appropriated,[195] vesting title in the successful captor. Yet if the resource eluded the captor before being placed into use, as when a wild animal escaped, ownership ended.[196] Indeed, adverse possession law as applied to wild lands may be reconceptualized as a variant of the capture rule. Privately owned, undeveloped lands are analogous to a captured resource such as a caged deer. The owner who exploits her property protects her title. But the owner who retains his land in its natural condition has effectively allowed it to elude his grasp. Like an escaping deer, it can be captured by the first claimant who places it in viable economic use.[197]

B. The Threat to Private Preservation

The nineteenth century vision of endless abundance faded long ago. Our finite world is governed by the first law of ecology: every-

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190 The tendency to view real property as a commodity is deeply ingrained in the American psyche, due both to the traditional surplus of wild land and the historic insistence on unfettered private property rights. *See* Caldwell, *supra* note 135, at 761-62.

191 For analyses of the rule of capture, see Rose, *supra* note 7, at 76-77; Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

192 *See generally* Rose, *supra* note 7, at 76-77 (discussing the general concept that possession creates property rights).

193 *See, e.g.*, Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (finding that killing of finback whale created property rights); Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (holding physical capture of wild fox necessary to create property rights).

194 *Cf.* Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. Ct. App. 1934); Westmoreland & Cambria Nat. Gas Co. v. DeWitt, 18 A. 724, 725 (Pa. 1889).

195 *See* RESTATEMENT (SECOND) OF TORTS, ch. 41, Introductory Note at 256 (1977).

196 *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. Ct. App. 1934) (holding natural gas stored in underground natural cavern eluded control of owner, by analogy to wild animals); Mullett v. Bradley, 53 N.Y.S. 781 (1898) (concluding that escape of undomesticated sea lion extinguished captor's property rights).

197 Adverse possession decisions occasionally employ the capture metaphor, although typically in the context of sufficiency of notice. *See, e.g.*, Brown v. Berman, 21 Cal. Rptr. 401, 402 (Cal. Ct. App. 1962) (characterizing adverse possession as "the historical doctrine which permits one who takes by 'bow and spear', and defends against all comers, to acquire title on expiration of the statutory period").

thing is connected to everything else.[198] Wild lands form the foundation of an ecological pyramid upon which all species ultimately depend.[199] Development irreversibly degrades—and often destroys—the overall integrity and ecological stability of these lands.[200] It is difficult, however, to evaluate the past impact of American adverse possession law on private preservation because such preservation is comparatively recent. Widespread, formal private preservation—through acquisition by land trusts, conservation organizations and other entities—has occurred only in the last twenty years.[201] No reported decision involves an adverse possession claim against such a strongly preservationist owner. Yet because adverse possession requires activity over long periods, claims affecting such property may still be maturing. Indeed, many private owners who elected not to sell or develop their wild lands over the years have lost title through adverse possessors.[202] It is reasonable to infer that some of these owners had consciously chosen to preserve the natural condition of their lands, either permanently or temporarily.[203] Thus, adverse possession has presumably interfered with informal private preservation to some extent.

Given the dramatic expansion of private preservation efforts in recent years, the immediate threat to environmental protection posed by American adverse possession law is disturbingly real. The doctrine may lead to environmental damage in three ways: title acquisition activities by the adverse claimant; postacquisition activities by the claimant or her successors; and title retention activities by the true owner.

First, the acts of adverse possession by which the claimant acquires title may harm the land. The law encourages the claimant to exploit the property, and thus to inflict environmental damage. Imagine that for the statutory period, claimant *A* both selectively cuts timber and occasionally grazes cattle on a 100 acre forest tract belonging

198 *See* BARRY COMMONER, THE CLOSING CIRCLE: NATURE, MAN, AND TECHNOLOGY 33 (1971); SCIENCE ACTION COALITION, WITH ALBERT J. FRITSCH, ENVIRONMENTAL ETHICS 3-4 (1980).

199 *See* SCIENCE ACTION COALITION, *supra* note 198, at 4; *see also* ALDO LEOPOLD, A SAND COUNTY ALMANAC 251-55 (Ballentine Books 1966) (1949) (describing the "land pyramid" as including a "fountain of energy flowing through a circuit of soils, plants and animals").

200 *See generally* NASH, *supra* note 99, at 263-73 (discussing the irony that intensive recreational use of natural lands destroys their wilderness values).

201 *See supra* note 182.

202 *See* cases cited *supra* at notes 58-86.

203 Preservationist motivation is not mentioned in any reported decision transferring wild land through adverse possession. This is unsurprising for two reasons. First, the concept of private preservation is comparatively recent. Second, under existing law, an owner's motivation to preserve is both irrelevant and counterproductive. To defeat an otherwise valid adverse possession claim, the owner must rely on his own exploitative acts to preclude exclusivity. His incentive is to testify to use, not preservation. *See supra* notes 91-97 and accompanying text.

to *O*. The timbering might well result in minor damage, potentially including injury to young trees and undergrowth, soil erosion, sediment pollution in nearby watercourses and other damage to forest and aquatic life.[204] The grazing might produce similar results.[205] Suppose *O* now sues *A* in ejectment and also seeks compensation for the harm that *A* has caused to the land. Under the current regime, it is likely that *A* both successfully defends the suit and acquires title by adverse possession. This result retroactively legitimizes the environmental injury. Furthermore, having lost title, *O* can no longer attempt replanting or other partial restoration of the land. Ironically, *A*'s title stems from the degradation which he has caused. Moreover, as the facts in many cases suggest, the claimant's acquisition activities are often much more destructive than occasional timbering and grazing, and frequently result in obvious and permanent damage. For example, the adverse possessor sometimes engages in substantial timber cutting, including clear-cutting.[206] Another frequent scenario involves the claimant who clears a tract of wild land for agriculture.[207] Another recurring category is the adverse possessor who bulldozes the land in preparation for construction.[208] Such clearing of wild lands is the epitome of environmental devastation; the entire ecosystem is ir-

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204 Even selective timbering may cause some environmental damage. Most timbering methods involve the use of heavy equipment to transport logs, which not only has the potential to damage young trees and undergrowth, but also tends to compact and disturb forest soils. *See* Richard Whitman, *Clean Water or Multiple Use? Best Management Practices for Water Quality Control in the National Forests*, 16 ECOLOGY L.Q. 909, 917-19 (1989). Whitman notes that: "Disturbed soils have more surface area exposed to the rain and wind, and this exposure in combination with a loss of binding capacity increases the potential for erosion." *Id.* at 918. Similarly, compacted soils have less capacity to absorb rainfall, and thus tend to channel runoff, causing erosion. *Id.* Eroded sediments may in turn degrade the aquatic environment of streams, rivers and lakes by, for example, limiting sunlight penetration and reducing photosynthesis and smothering aquatic life such as fish eggs. *See* George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 466-68 (1990).

205 Stock allowed to graze in forest areas can injure or destroy young trees, accelerate erosion on slopes and compact soils, thus reducing soil quality. *See generally* 16TH CEQ REPORT, *supra* note 108, at 49 (describing environmental devastation caused by stock grazing in forest areas).

206 *Cf.* Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977) (involving adverse possessor who clear-cut 400 acres of forest).

207 *See, e.g.*, Gunther & Shirley Co. v. Presbytery of Los Angeles, 331 P.2d 257, 258 (Ariz. 1958) (involving adverse possessor who cleared 15 acres covered with "mesquite trees and other desert growth" for cultivation); Manville v. Gronniger, 322 P.2d 789 (Kan. 1958) (involving adverse possessor who cleared brush from part of 227 acre island for cultivation); Hitchcock v. Ledyard, 48 OKLA. BAR ASS'N J. 2525, 2526 (Okla. 1977) (involving adverse possessor who cleared part of 600 acre riverside parcel for cultivation); Cuka v. Jamesville Hutterian Mut. Soc'y, 294 N.W.2d 419 (S.D. 1980) (involving adverse possessor who cleared part of 13 acre wooded tract).

208 *See, e.g.*, Fritts v. Ericson, 436 P.2d 582 (Ariz. 1968) (involving adverse possessor who cleared part of desert tract for construction of motel and trading post).

reparably damaged.[209] Adverse possession presents the paradox that the environmental despoiler is rewarded with title.

Second, the transfer of title to the adverse possessor forebodes future damage from postacquisition activities. Assume that the property is now owned by *A*, whose orientation is economic use rather than preservation. Inevitably, *A* or his successors will use the land in a more intensive manner than *O* would have, perhaps clear-cutting the forest[210] and converting the land to agricultural use.[211] Additionally, development oriented successors pose a particular danger: the ownership transfer effected through adverse possession may ultimately return the property to the market. The nonpreservationist owner, after all, tends to view land as a commodity, to be sold to the highest bidder, regardless of the bidder's intended use.[212] It is possible, for example, that a claimant could acquire title to wild land through comparatively innocuous activities and then immediately resell the land to a buyer who plans to develop it. Once returned to nonpreservationist ownership, property lost through adverse possession may at some point, perhaps many resales later, be transferred to a buyer who devastates it.[213]

Third, the activities undertaken by the informed owner to retain title may cause damage to the land. Faced with the risk that preservation might result in loss of title, an economically motivated owner, aware of adverse possession law, would begin development and thus

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209 *See, e.g.*, Texas Comm. on Natural Resources v. Bergland, 573 F.2d 201, 208-09 (5th Cir. 1978) (discussing the impact of clear-cutting in forest areas); Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1088-89 (W.D. Wash. 1991) (analyzing the impact of logging on old growth forest, including effects on wildlife and plant habitat, ecosystem diversity and aesthetic qualities); Sierra Club v. Lyng, 694 F. Supp. 1260, 1269 (E.D. Tex. 1988) (noting in the clear-cutting context that humans and technology continue "at an ever-increasing rate to disrupt the natural ecosystem"); *see also* GLEN O. ROBINSON, THE FOREST SERVICE—A STUDY IN PUBLIC LAND MANAGEMENT 82-85 (1975) (discussing the impacts of clear-cutting).

210 *See, e.g.*, Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977) (involving adverse possessor who clear-cut 400 forest acres).

211 Occasionally the adverse claimant may be more inclined toward preservation than the true owner, especially when the claimant is a governmental agency. *See, e.g.*, State ex rel. Lassen v. Self-Realization Fellowship Church, 517 P.2d 1280 (Ariz. Ct. App. 1974) (rejecting state's adverse possession claim to 80 acres of "unimproved, desert land" used for grazing); Sears v. State Dep't of Wildlife Conservation, 549 P.2d 1211 (Okla. 1976) (rejecting state's claim to 20 forest acres enclosed within state game refuge); Johnson v. State, 418 P.2d 509, 511 (Or. 1966) (allowing state to adversely possess 240 acre forest parcel because it "utilized the land as it did other forest lands to the same extent as any owner of large forest acreage would do").

212 For example, The Nature Conservancy recently attempted to purchase a forested tract in southwestern Montana consisting of 175,000 acres (over 270 square miles), the largest private holding in the Greater Yellowstone area. TNC 1992 REPORT, *supra* note 183, at 49. The property was important because of its "exceptional biological values." *Id.* The owner, however, ultimately sold the tract to a lumber company. *Id.* at 49-50.

213 *See* Joseph L. Sax, *Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property*, 1983 UTAH L. REV. 313, 315.

prevent the required exclusivity.[214] Conversely, a strongly preservationist owner would eschew development in favor of inspection.[215] Given the low threshold for adverse possession of wild lands, however, frequent and intensive monitoring is needed to detect adverse claimants.[216] Although preservationist owners often perform aerial inspection of large tracts,[217] the effectiveness of such inspection is limited.[218] Under a legal regime that permits adverse possession based on rare, almost invisible actions, it would be difficult to detect the adverse claimant on a remote tract, absent a permanent staff eternally seeking tree stumps, partly eaten brush and other traces of hostile activity. Yet such intensive monitoring might itself cause environmental damage in sensitive areas.[219]

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214 *See supra* notes 91-96 and accompanying text.

215 Conservation organizations typically do monitor and inspect their properties to some extent. *See* DIEHL & BARRETT, *supra* note 185, at 87-93; Andrew Johnson, *The Challenges of Long-Term Management, in* PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION 208 (1982) [hereinafter PRIVATE OPTIONS]; Jan W. McClure, *Monitoring Protected Lands, in* LAND-SAVING ACTION 57, 58-59 (Russell L. Brenneman & Sarah M. Bates eds., 1984).

216 Although preservation advocates are seemingly conscious that adverse possession presents risk, they typically appear unaware that intensive and frequent monitoring activity is necessary to obviate the problem. *See, e.g.*, Suzanne C. Wilkins, *How To Manage Land Acquired by the Trust, in* LAND-SAVING ACTION, *supra* note 215, at 53, 55-56 (recommending periodic inspection of land owned by trust to avoid adverse possession in one section of article, apparently without awareness of the adverse possession danger posed by the "common" problem of unauthorized cutting of timber for firewood, which is discussed in another section without reference to adverse possession).

217 *See, e.g.*, Poole, *supra* note 187, at 58 (noting that certain large land trusts inspect their protected lands annually by airplane); McClure, *supra* note 215, at 58-59 (discussing annual aerial inspection of properties protected by the Society for the Protection of New Hampshire Forests).

218 *Cf.* Horn v. Lawyers Title Ins. Corp., 557 P.2d 206, 208 (N.M. 1976) (involving situation in which agent of buyer of 116,000 acre tract of desert and grasslands flew over property before purchase, but did not specifically view site of adverse possessor's activities, which included seasonal cattle grazing, seasonal cultivation and weekend visits).

219 Effective monitoring might well require frequent and intensive inspection on foot, since the wild lands standard sets such a low threshold. *Cf.* Klingel v. Kehrer, 401 N.E.2d 560, 564 (Ill. App. Ct. 1980) (holding owner of wooded tract who saw no stumps or other evidence of timber cutting on visits throughout entire statutory period lost property to adverse claimant based on tree cutting); Knecht v. Spake, 346 P.2d 98 (Or. 1959) (holding owner of rough, steep and brushy tract lost land to adverse possessor whose activities were outings, limited brush clearing, picnics and removal of two loads of leaf mold). The human intrusion necessary for such intensive monitoring might cause environmental damage in fragile areas such as wildlife refuges. Bird sanctuaries, for example, are sometimes closed to visitation to prevent disturbance. *See, e.g.*, William W. Johnson, *California Condor: Embroiled in a Flap Not of Its Making*, SMITHSONIAN, Dec. 1983, at 73, 74 (noting that the United States Forest Service banned "all human travel in and use of" a 1200 acre tract in order to protect the endangered California condor). Intensive monitoring might also result in the creation of de facto trails, which could cause limited environmental impacts in sensitive areas by destroying plant life and compacting soil, thus increasing erosion. In general, as human intrusion increases, so does the risk of environmental degradation. *See* NASH, *supra* note 99, at 263-73. Ultimately, the time and expense consumed by such moni-

Accordingly, the preservationist owner faces a dilemma: either preserve the land and risk the environmental damage that may occur if it is lost through adverse possession or inflict environmental damage to avoid loss of title. Ultimately, such an owner may he forced to choose inspection as the lesser of two evils and tolerate the degradation which accompanies intensive monitoring. Total preservation of wild lands by private owners may therefore be impossible under existing law.

III
TOWARD THE ENVIRONMENTAL REFORM OF ADVERSE POSSESSION

The axiom of economic growth regardless of environmental cost was discarded long ago. With its passing, the dominant rationale for adverse possession expired.[220] Modern society values the preservation of wild, natural lands for both moral and utilitarian reasons. Many Americans agree that society has an affirmative obligation to preserve the natural environment stemming not from anthropocentric self interest, but rather from moral duty.[221] Further, most Americans acknowledge that enlightened self-interest mandates the utilization of finite resources such as wild lands, if at all, in an environmentally-conscious manner that maximizes their long-term benefit to human-

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toring may tip the balance between preservation and sale, inducing some owners to sell their wild lands and deterring others from seriously considering preservation.

220 This changing attitude was chronicled in Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972). In *Just*, the Wisconsin Supreme Court observed:

> Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

Id. *See also* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (noting "growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state"). American public opinion finds environmental protection more important than economic development by a three-to-one margin (64% to 17% percent). NATURAL RESOURCE CONSERVATION, *supra* note 177, at 55.

221 *See infra* note 248 (discussing results of 1992 Roper Organization survey concerning moral duty as a basis for environmental protection).

ity.[222] Accordingly, adverse possession must be reconfigured to serve environmental goals.[223]

Efforts to regulate environmental preservation typically conflict with the tradition of owner autonomy. The classic common law landowner, after all, was largely unfettered by governmental land use restrictions.[224] But environmental preservation and owner autonomy are aligned in the interest of restricting the scope of adverse possession.[225]

I propose a simple reform: exemption of privately-owned[226] wild lands from adverse possession. The following sections first describe

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222 For example, in the 1992 Roper survey, 92% of respondents agreed that "we can find a good balance that will allow us to enjoy economic progress and protect the environment." NATURAL RESOURCE CONSERVATION, *supra* note 177, at 64. Similarly, 70% of respondents agreed that "we can protect and conserve wildlife, natural areas, and natural resources by managing these resources, while also using them for the benefit of our economy and the public." *Id.* at 56.

223 The only serious attempt at such an environmental reform is a 1991 amendment to the Massachusetts adverse possession statute which exempts lands owned by certain nonprofit owners from its operation. *See infra* note 233 and accompanying text. A few courts have questioned adverse possession on environmental grounds, but none has ever denied a claim on this basis. *See* Finley v. Yuba County Water Dist., 160 Cal. Rptr. 423, 427 (Cal. Ct. App. 1979) (acknowledging in dicta that "environmental concerns may sometimes result in relative disuse being more in the public welfare than are uses which disrupt the land's more primitive condition"); Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973) (noting that the concept of adverse possession is "perhaps . . . somewhat outdated" and suggesting that the policy reasons which once supported adverse possession "may well be succumbing to new priorities"); Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 6 (Pa. 1988) (McDermott, J., dissenting) (stating that "[t]he romantic notion that an interloper upon the land of another challenges the world bespeaks a time of wilderness and unrecorded land titles").

224 Thus, over 200 years ago, Blackstone explained the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." EHRLICH'S BLACKSTONE 113 (J.W. Ehrlich ed., 1959).

225 At best, environmental preservation and owner autonomy are uneasy allies. I do not mean to suggest that owner autonomy in general should be resurrected as a dominant theme. My point is only that in this narrow setting of adverse possession as applied to wild lands both support reform.

226 The text below considers only whether adverse possession should be permitted against an owner holding fee simple title to wild lands. A related question is whether adverse possession should be allowed against the holder of a conservation easement encumbering such land. In general, adverse possession does not apply to nonpossessory interests, that is, interests in land which create no right to possession in the holder. *See* 7 POWELL, *supra* note 5, ¶ 1017. Thus, although affirmative easements are typically vulnerable to adverse possession, covenants and restrictions are not. As Gerald Korugold has observed, the term "conservation easement" is unfortunate; he argues that in substance and effect the interest more closely resembles a covenant than an easement. Gerald Korugold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 436-37 (1984). Despite the misleading label, a conservation easement is essentially nonpossessory. Although an affirmative easement allows its holder to utilize the land of another, the holder of the conservation easement has little interest in use; rather, its focus is on preserving the existing condition of the land by preventing destructive use. Admittedly, the terms of a conservation easement typically al-

the mechanics of this proposal[227] and then justify the proposal based on moral duty, environmentally-conscious utilization of finite resources and owner autonomy.[228] Finally, the Article examines possible objections to the proposal premised on efficient land use, minimization of administrative costs, and repose for the adverse possessor.[229]

A. The Proposed Reform: A Wild Lands Exemption

The proposed wild lands exemption may be implemented either through legislative or judicial action. The potential legislative response is straightforward. Although the requirements for adverse possession stem largely from common law, the core of the doctrine is statutory; each state has one or more statutes establishing time limits for actions to recover possession of real property.[230] State legislatures could simply amend these statutes to exclude wild lands from their scope through the addition of language similar to the following: "but this section shall not bar an action for the recovery of land or interests in land if the land was in a substantially wild condition immediately before the statute of limitations period began." The exemption should apply to land which is in a *substantially* natural, undeveloped condition before adverse possession activity begins.[231] Land that has suffered minor human intrusion, such as seasonal grazing, timber thinning or fence installation still supports largely undisturbed ecosystems. Land whose natural vegetation has been destroyed, however, does not; thus, the filled wetland, the bulldozed grassland and the chopped forest would remain susceptible to adverse possession.[232] For such a rule to be effective, the baseline condition of the land must be assessed without considering the actions of the adverse possessor.

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low the holder access to the property to ensure compliance with the use restrictions. *See, e.g.*, DIEHL & BARRETT, *supra* note 185, at 157 (providing a model easement agreement). This incidental monitoring right, however, should not be deemed to convert such an easement into a possessory interest. Nonetheless, if a conservation easement is considered subject to adverse possession, then the recommendation and analysis below in the fee simple context are equally applicable. Massachusetts and New York, for example, already provide by statute that such easements are not subject to adverse possession. MASS. ANN. LAWS, ch. 260, § 21 (Law Co-op. 1992 & Supp. 1993); N.Y. ENVTL. CONSERV. LAW § 49-0305 (McKinney 1984 & Supp. 1994).

227 *See infra* text accompanying notes 230-42.

228 *See infra* text accompanying notes 243-82.

229 *See infra* text accompanying notes 283-330.

230 *See supra* notes 33-34 and accompanying text.

231 The extreme case—the claimant acting in good faith, holding color of title following a purchase at fair market value, who innocently bulldozes the property, totally eliminating its environmental values—presents a nettlesome problem. Just as it is impossible to put toothpaste back in the proverbial tube, it would be impractical (and perhaps impossible) to restore the land completely.

232 Note, however, that land may revert to near wild status, as natural vegetation and wildlife return. *See* 16TH CEQ REPORT, *supra* note 108, at 32.

Otherwise, an informed claimant would still be motivated to degrade the property as rapidly as possible, subverting the preservation goal.

This legislative approach was partially followed in Massachusetts, the only state that has reacted seriously to the environmental implications of adverse possession.[233] In 1991 Massachusetts amended its basic adverse possession statute to provide that it would not bar "an action by or on behalf of a nonprofit land conservation corporation or trust for the recovery of land or interests in land held for conservation, parks, recreation, water protection, or wildlife protection purposes."[234] Yet the Massachusetts response is half-hearted; the statute does not protect land owned by other categories of owners for preservation purposes, including individuals.

The judicial avenue, in contrast, would be to redefine the common law element of exclusivity.[235] The owner who utilizes his land in an economic manner suited to its location, nature and condition precludes exclusivity and thus insulates the property from adverse possession. This formulation of exclusivity reflects the nineteenth century axiom that wild land had value only when placed in consumptive use. Just as our societal view of the importance of wild land has broadened, the common law could expand the scope of owner conduct sufficient to prevent adverse possession beyond consumptive use. A simple first step would be to preclude exclusivity based on nonconsumptive, recreational uses such as hiking, camping, picnicking, bird-watching and the like.[236] Each of these activities may be an owner-oriented use suited to the location, nature and condition of a particular tract of wild land. As one Florida court observed in rejecting an adverse possession claim on other grounds, a man who owns "some virgin land,

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233 MASS. ANN. LAWS ch. 260, § 21 (Law Co-op. 1992 & Supp. 1993). The only other state that has addressed the issue is New York, which statutorily exempts holders of certain conservation easements from the scope of adverse possession, but provides no protection to owners holding fee simple title. *See supra* note 188 and accompanying text.

234 MASS. ANN. LAWS ch. 260, § 21 (Law Co-op. 1992 & Supp. 1993).

235 One might consider an alternative approach—simply strengthening the standard for adverse possession of wild lands by requiring a level of activities that is sufficient to afford constructive notice, such as residence, improvement or cultivation. Such a standard, however, while more effective in providing notice, might well exacerbate the environmental damage resulting from adverse possession, because claimants would be even more motivated to inflict environmental injury than under current law.

236 Some decisions have relied on such nonconsumptive uses as partial bases for justifying adverse possession. *See, e.g.*, Cluff v. Bonner County, 824 P.2d 115, 117 (Idaho 1992) (noting that activities including camping raised questions of fact on adverse possession); Stowell v. Swift, 576 A.2d 204, 205 (Me. 1990) (noting that picnicking was one element supporting adverse possession); Kline v. Bourbon Woods, Inc., 684 S.W.2d 938, 940 (Mo. Ct. App. 1985) (holding hiking and hunting sufficient for adverse possession). Because the activities needed to establish adverse possession by the claimant are also generally sufficient to bar exclusivity if performed by the true owner, these cases indirectly support the proposition that an owner's camping, picnicking, hiking or similar activities could defeat exclusivity.

who refrains from despoiling that land . . . and who makes no greater use of that land than an occasional rejuvenating walk in the woods, can hardly be faulted in today's increasingly 'modern' world."[237] The traditional distinction between productive and recreational activity in the exclusivity context serves no purpose; indeed, the border between the two has already blurred. Hunting illustrates the point. Hunting by an owner is sufficient to preclude exclusivity, although it may be considered both personal recreation and economic exploitation.[238] It requires no leap of logic for a court to hold that an owner's use of her property—whether productive or recreational—will prevent adverse possession.

The preservation of wild land also confers benefits[239] on other properties, including the protection of water quality, wildlife habitat and aesthetic values,[240] that transcend the owner's individual self-interest. The insistence of adverse possession doctrine that each parcel of land be evaluated essentially as an island, in isolation from surrounding properties, is no longer defensible. Accordingly, an additional judicial step would be to recognize that an owner who allows her land to provide such external benefits has "used" it sufficiently to avoid adverse possession. Ultimately, farsighted courts should hold that preservation alone is sufficient "use" to preclude adverse possession, requiring proof of neither owner use nor external benefit in the particular case. This final step would acknowledge the importance of preserving wild land in general, embracing the themes of moral duty, owner autonomy and preservation value.[241]

Whether implemented through legislative or judicial action, the proposed reform would permit the private preservation of wild land. The adverse possessor would lose the incentive to despoil; the owner could avoid the damage caused by monitoring activities; and the danger that title might be transferred from a preservationist owner to an exploitative claimant would vanish. The adverse possessor without color of title would be treated as a mere trespasser, subject to prosecution for any environmental injury he inflicts. While the good faith adverse possessor with color of title could no longer derive property rights from use, she would still be accorded the opportunity both to litigate her ownership claim in a timely quiet title action and, if unsuc-

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237 Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973).

238 *See, e.g.*, Butler v. Lindsey, 361 S.E.2d 621, 624 (S.C. 1987) (holding that owner's hunting precluded exclusivity).

239 *See infra* notes 259-67 and accompanying text.

240 *Cf.* Rutar Farms & Livestock, Inc. v. Fuss, 651 P.2d 1129, 1132 (Wyo. 1982) (noting trial court finding that the highest and best use of the disputed 31 acre tract was as a "wildlife refuge," although both owner and adverse possessor used it for grazing).

241 *See infra* notes 243-89 and accompanying text.

cessful, to receive any applicable protection under the good faith improver statutes.[242]

B. Justifications

1. *Moral Duty*

The heart of contemporary environmentalism[243] is the precept that humans have a moral duty to protect the environment, which is an intellectual descendent from theories of natural law and natural rights.[244] Aldo Leopold, the foremost advocate of this view in the land use context, postulated that the relationship between man and nature must be harmonious.[245] Leopold argued for the development of a "land ethic" that would respect the intrinsic value of non-human species and the global ecosystem as a whole.[246] Although scholars have debated the success of this vision,[247] recent survey data reveals widespread popular acceptance of the related concept that every living species has a fundamental right to exist.[248] A majority of Americans now agree that protection of other species is a "moral duty."[249]

While the extent to which environmental ethics should shape public policy toward land use in general remains controversial, at a minimum, many consider moral duty to be a legitimate factor in land

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242 I recognize the incongruity of both (a) depriving the adverse possessor of his claim based on physical development of the property (such as installing fences, buildings and the like) on the basis of environmental concerns and (b) requiring the owner to compensate the claimant for the value of these "improvements," which may themselves have caused environmental injury. It might therefore be appropriate to reconsider the application of good faith improver statutes to wild land.

243 I distinguish here between environmentalism, which focuses on preservation for its own sake, and what may be called environmentally-conscious utilitarianism, which justifies preservation on the basis of enlightened human self-interest, and may be loosely equated with conservationism.

244 *See* PEOPLE, PENGUINS, AND PLASTIC TREES: BASIC ISSUES IN ENVIRONMENTAL ETHICS 10-13 (Donald VanDeVeer & Christine Pierce eds., 1986) [hereinafter PEOPLE, PENGUINS, AND PLASTIC TREES]; SCIENCE ACTION COALITION, *supra* note 198, at 17-25; Mark Sagoff, *Can Environmentalists Be Liberals? Jurisprudential Foundations of Environmentalism*, 16 ENVTL. L. 775 (1986); J. Baird Callicott, *Non-Anthropocentric Value Theory and Environmental Ethics*, 21 AM. PHIL. Q. 299 (1984); Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974).

245 *See* LEOPOLD, *supra* note 199, at 237-64. *See also* James P. Karp, *Aldo Leopold's Land Ethic: Is An Ecological Conscience Evolving in Land Development Law?*, 19 ENVTL. L. 737 (1989) (describing the essential elements of the land ethic proposed by Leopold).

246 *See* LEOPOLD, *supra* note 199, at 237-64.

247 *Compare* Karp, *supra* note 245 (arguing that the Leopoldian land ethic is spreading) *with* Charles E. Little, *Has the Land Ethic Failed In America? An Essay on the Legacy of Aldo Leopold*, 1986 U. ILL. L. REV. 313 (arguing that this ethic has been ignored).

248 *See* NATURAL RESOURCE CONSERVATION, *supra* note 177, at 62 (reporting that in 1992 Roper survey, 63% of respondents considered the position that all species have a "fundamental right to exist," such that humans have a "moral duty" to help all species survive, to be a "strong argument" in favor of such protection).

249 *Id.*

use decisions.[250] The strength of this belief may turn on the environmental significance of the specific property involved. For example, we would expect a broader consensus that a moral obligation exists to safeguard a wetland parcel which serves as the last remaining habitat of an endangered species than to preserve an ordinary wetland tract.[251] As applied to a reevaluation of American adverse possession law affecting wild lands in a general sense, moral duty supports reform to some extent.[252] The adverse possessor enjoys no such moral standing.

2. *Environmentally-Conscious Utilitarianism*

Utilitarianism, the dominant theory underpinning American property law, is anthropocentric; it values nature solely as an instrument that provides benefits for humans.[253] In the wild lands context, adverse possession law reflects the historically exploitative character of traditional utilitarianism—resources should be consumed as quickly as possible. Adverse possession has sacrificed the traditional property rights of private owners for the broader goal of economic development. Yet today the nation is largely developed; the need to encourage settlement and exploitation of wild areas has vanished. The rationale for the nineteenth century policy tilt toward adverse possession therefore no longer exists.

Moreover, the twentieth century has taught us that the resources of the world, including wild lands, are finite and exhaustible. Nature, at least to some extent, constrains human activity. The wild lands area of the United States continues to shrink,[254] as irreversible destruction precedes development.[255] Modern public policy should encourage

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250 *Id.*

251 Two examples from the 1992 Roper Organization survey are useful by analogy. When asked to choose between protecting the development rights of the true owner versus protecting the environment in different hypothetical situations, respondents were affected by the environmental sensitivity of the land involved. For example, 68% favored environmental protection over the owner's right to "harvest" a private forest when doing so would "harm a species of bird threatened with extinction;" yet only 52% favored such protection over the owner's right to build a barn "on an official wetland area which might be damaged." *See* NATURAL RESOURCE CONSERVATION, *supra* note 177, at 64.

252 This may not be true, of course, if the environmental attributes of individual parcels are considered. One recognizing a moral obligation to preserve endangered species, for example, might be unwilling to extend that obligation to preserve a wild land tract which provides no endangered species habitat.

253 *See generally* PEOPLE, PENGUINS, AND PLASTIC TREES, *supra* note 244, at 13-15 (discussing utilitarian theories of John Stuart Mill and Jeremy Bentham in the environmentalist context).

254 For example, during the 1980s alone, over 166 million acres of wetlands were lost. *See* COUNCIL ON ENVIRONMENTAL QUALITY, 22ND ANNUAL REPORT: ENVIRONMENTAL QUALITY 303 (1991).

255 Complete restoration is rare, partly due to inadequate technology. *See* DAVID EHRENFELD, THE ARROGANCE OF HUMANISM 187 (1978) (noting that instances of "totally

the preservation of privately owned wild lands, not—as currently—their destruction.[256] Even if we view wild lands solely from an anthropocentric perspective, enlightened self-interest demands that we manage them in an environmentally-conscious manner.[257]

Protection of wild lands in general provides three distinct types of human benefit which outweigh the interest of the adverse possessor: preservation value, nonconsumptive use value and consumptive use value. First, preservation in the abstract confers human benefit even without human use. Compare the adverse possessor with the strongly preservationist owner. Assuming that the owner is rational, her preservation decision must stem from a cost-benefit analysis. In other words, the personal benefits that the owner derives from preservation on moral, ethical, religious or philosophical grounds must outweigh the financial benefits that she could derive from exploitation of the land. The owner has elected preservation despite the costs inherent in both holding the land and foregoing its resale value.[258] In economic parlance, the owner derives more utility from the land than would an adverse possessor interested in development.

The public in general similarly derives vicarious value from the preservation of natural areas.[259] While difficult to measure, vicarious value does exist.[260] For example, one study found that twenty percent

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rebuilt ecosystems are still rare"); Lance D. Wood, *Requiring Polluters to Pay for Aquatic Natural Resources Destroyed by Oil Pollution*, 8 NAT. RESOURCES LAW. 545, 598 (1976) (noting that the technology to "restock plant and animal communities is very limited at present"). Restoration efforts are also extremely expensive. *See, e.g.*, Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 661 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) (noting trial testimony that cost of restoration of 40 acres of mangrove swampland would be over $14,000,000 or $350,000 per acre).

256 *Cf.* Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring in part and dissenting in part) (arguing that public policy in favor of "preserving land in its natural state" supports a heightened standard for adverse possession).

257 As a nation, we have equated environmental protection with environmentally-conscious utilitarianism. Modern federal environmental legislation, for example, is justified not in moral terms, but rather in terms of long-range benefit to humanity. Thus, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1977 & Supp. 1993), is explained, inter alia, as necessary to assure "safe, healthful, productive, and aesthetically and culturally pleasing surroundings" for Americans. 42 U.S.C. § 4331(b)(2) (1977 & Supp. 1993). Even the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1985 & Supp. 1993) is devoted to preserving other species with "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3) (1985 & Supp. 1993).

258 Holding costs include taxes, assessments, insurance costs, interest payments and other expenses incurred in maintaining ownership. Strongly preservationist owners acquire property both by purchase and by donation. In either case, however, the act of perpetual preservation reflects a sacrifice of the dollar value which could be derived from sale of the land on the open market.

259 *See generally* Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 287-288 (1989) (discussing vicarious value in the environmental preservation context).

260 One method of demonstrating the existence of vicarious value is to examine the extent of public participation in conservation organizations. The Nature Conservancy, for

of families surveyed were willing to pay $25.00 each annually for the continued existence of the natural ecosystem of the South Platte River Basin in Colorado, even though these families did not use the area.[261] Indeed, the very difficulty inherent in assessing vicarious value augurs in favor of preservation. In the analogous context of crafting a remedy for injury to natural resources caused by hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act,[262] Congress chose to assess damages based on the cost of restoring land to its natural condition, in lieu of damages based on market value or use value.[263] As one court noted, this choice reflected skepticism as to the ability of humans to measure the true value of natural resources.[264]

Second, preservation permits future nonconsumptive human usage of wild lands, including recreation, visual enjoyment, watershed protection and wildlife and fisheries development.[265] The rational preservationist owner derives more utility from holding property for such nonconsumptive use than the adverse possessor would derive from development. Moreover, others might also value nonconsumptive use for the external benefits flowing from retention of the property in its natural condition. For example, in a case involving the valuation of a mangrove swamp that was devastated by an oil spill, one expert testified that while the fair market value of the affected land was $5,000 per acre, the use value of the land was $50,000 per acre, when one assigued value to functions such as water filtration, recreation, aesthetics and wildlife protection.[266] Accordingly, although the hypothetical adverse possessor of a similar mangrove swamp acre might derive utility valued at $5,000, society might derive utility valued

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example, has over 662,000 members who contributed over $120 million to it in 1992 alone. TNC 1992 REPORT, *supra* note 183, at 4, 69.

261 *See* Douglas A. Creenley et al., *Option Value: Empirical Evidence From A Case Study of Recreation aud Water Quality*, 97 Q. J. ECON. 657, 667 (1981).

262 42 U.S.C. §§ 9601-9657 (1984 & Supp. 1993).

263 *See generally* Ohio v. United States Dep't of the Interior, 880 F.2d 432, 456-57 (D.C. Cir. 1989) (discussing the rejection of economic efficiency in the context of natural resource damages).

264 *Id.* at 457.

265 *See generally* JOHN S. DIXON & PAUL B. SHERMAN, ECONOMICS OF PROTECTED AREAS: A NEW LOOK AT BENEFITS AND COSTS 15-18 (1990) (noting that such nonconsumptive uses include recreation, tourism, watershed protection and wildlife and fisheries development); Cross, *supra* note 259, at 282-84 (same).

266 *See* Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652, 661 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (I981); *see also* Hoffman Homes, Inc. v. Administrator, E.P.A., 961 F.2d 1310, I314 (7th Cir. 1992) (discussing the importance of wetland preservation in water filtration and wildlife habitat); Commissioner of Natural Resources v. S. Volpe & Co., 206 N.E.2d 666, 669 (Mass. 1965) (discussing the impact of filling wetlands on plant and animal species, including fisheries).

at $50,000 from nonconsumptive uses.[267] A few decisions have mentioned nonconsumptive use value in refusing to allow adverse possession of wild lands.[268] For example, a line of Wisconsin cases rejected adverse possession claims to forest lands on the basis that public policy should encourage owners to allow their neighbors the "use and enjoyment of the forest."[269] Similarly, a California court observed that "environmental concerns may sometimes result in relative disuse being more in the public welfare than are uses which disrupt the land's more primitive condition."[270]

Finally, even if wild land is destined for eventual consumptive use, temporary preservation by the owner is preferable to immediate exploitation by the adverse possessor. Like a herdsman tragically sharing the common,[271] the adverse possessor is motivated to utilize land inefficiently for short-term gain, even at the expense of long-term harm. Consider, for example, 100 acres of forest that the owner intends to cut at maturity to maximize its value. The adverse possessor would be inclined to cut at least part of the forest prematurely[272] to create her adverse possession claim, even though such an early harvest would not maximize lumber value.[273] For the same reasons, the adverse possessor is less likely to take precautions to minimize damage to land caused by consumptive use.

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267 One may challenge any attempt to convert social utility into dollar value as irrelevant, hopelessly flawed or both. Environmental values are not easily quantified. Moreover, interests of future generations are typically discounted. Whatever its flaws may be, in this context dollar value may provide a helpful yardstick, even if it inevitably tends to minimize those environmental values that defy monetization. For an exploration of nonconsumptive use values in the natural resources context, see Edith B. Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984).

268 *See, e.g.*, Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring in part and dissenting in part) (noting trend "toward adopting a public policy of preserving land in its natural state" due to increasing urbanization); Meyer v. Law, 287 So. 2d 37, 41 (Fla. 1973) (commenting on the usefulness of a "rejuvenating walk in the woods").

269 *See* Pierz v. Gorski, 276 N.W.2d 352, 356 (Wis. Ct. App. 1979).

270 Finley v. Yuba County Water Dist., 160 Cal. Rptr. 423, 427 (Ct. App. 1979).

271 *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (Dec. 1968).

272 For the same reasons, the adverse possessor is less likely to consider the quasi-option value of wild lands—the possibility that the wild land provides habitat for species which, although valueless to humans today, may develop substantial value through future scientific discoveries. The humble Pacific Yew tree illustrates this point. Inhabiting forests of the Pacific Northwest, it was considered worthless until the comparatively recent discovery that its bark contained taxol, a substance that shows remarkable promise in the treatment of various forms of otherwise incurable cancer. *See generally* Sharon Begley, *The Lowly Yew Tree Yields Riches*, NEWSWEEK, Nov. 11, 1991, at 67 (discussing value of yew trees).

273 This is simply a variant of the familiar common pool problem. *See supra* notes 191-97 and accompanying text. For an economic analysis of the common pool problem, see ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 185-90 (1988).

3. *Owner Autonomy*

The second principal theme underlying American property law, frequently in conflict with the broader societal goals embraced by utilitarianism, is owner autonomy. The early United States was strongly influenced by an absolutist view of private property rights, summed up by Blackstone as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[274] The owner autonomy theme finds modern expression in both expectation-based[275] and libertarian property theories.[276] American land use law has historically adhered to the Blackstonian vision of minimal restraints on an owner's right to use (and by implication the right not to use) his land, subject to a few exceptions, such as nuisance and adverse possession. Typically ignorant of adverse possession law, landowners developed the working—if perhaps unreasonable—expectation of complete freedom in land use decisions, absent conduct that interfered with the rights of others.[277]

This absolutist approach has waned in recent decades. Land use regulation has expanded and owner expectations of future government regulation have justifiably shifted.[278] Yet owner expectations concerning the rights of third parties have not changed. Most owners still share the absolutist vision that property rights are free from third party interference, and would be astonished to learn that they could

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274 EHRLICH'S BLACKSTONE 113 (J.W. Ehrlich ed., 1959). *See also* Caldwell, *supra* note 135, at 768 (discussing the impact of this approach in the United States); Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67, 67-69 (1985) (same).

275 For the immediate purpose of this discussion, I consider approaches such as Margaret Radin's personhood analysis as falling within the penumbra of owner expectation theory. *See* Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Property and Personhood*]. While Radin reasons that personhood may support adverse possession in some instances, her analysis does not consider the wild lands context. *See* Margaret J. Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 748-50 (1986) [hereinafter Radin, *Time, Possession, and Alienation*]. Indeed, Radin's discussion of the seminal takings case of Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972), notes that the owner's rights to develop wetland property were merely fungible, implicitly recognizing that an owner's right to environmental preservation falls toward the personal side of her continuum. Radin, *Property and Personhood*, *supra*, at 1007-08.

276 *See infra* note 281.

277 *See* Caldwell, *supra* note 135, at 761-62; Sax, *supra* note 213, at 318.

278 Commentators have widely discussed the process by which the land use expectations of the reasonable owner have slowly diminished during the twentieth century in the face of increased regnlation. *See* Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Donald W. Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039; Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); *see also* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992) (noting that "[i]t seems . . . that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers").

lose their title to undeveloped lands through the sporadic activities of an apparent trespasser.[279] Consistent with modern property theorists who have placed increasing emphasis on protecting expectations in structuring private property rights,[280] the proposed adverse possession reform would respect the actual expectations of the typical owner. Similarly, libertarian theory posits that the law should allow an owner total autonomy over his property, except to the extent that his actions may harm others.[281] Under a pure libertarian system then, adverse possession would not exist at all, regardless of the type of property involved. As Robert Ellickson characterizes it, adverse possession is a "dent" in the libertarian model of property rights.[282]

If adverse possession law affected only the owner who abandons his property, one could argue that it is not incompatible with the principle of owner autonomy. The owner who permanently abandons his property is the quintessential villain in the adverse possession drama. He has no expectation of continued ownership rights; indeed, his expectation is quite the opposite. In libertarian terms, he has exercised his autonomy by surrendering it. However, preservation is not abandonment. The owner who opts to maintain his land in its natural condition retains the traditional expectation that this is his right. He expects that third parties will not be able to interfere with this right, regardless of the manner in which he chooses to enjoy the benefits of his land.

C. Objections

With the demise of the prodevelopment rationale for adverse possession law as applied to wild lands, the possible objections to the proposed reform are directed toward adverse possession law in gen-

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279 It is difficult to determine the extent to which individual owners are at all aware of adverse possession law. Law students and prospective real estate agents typically receive exposure to the doctrine through instruction. Adverse possession is also occasionally the subject of newspaper articles and columns for the general reader. *See, e.g.*, Robert J. Bruss, *Protecting Yourself From Real Estate 'Theft,'* CHI. TRIB., Aug. 5, 1993, § 6, at 5 (discussing adverse possession law generally); Ron Galperin, *Property Values: Owners Need to Be Vigilant to Protect Property Rights*, L.A. TIMES, Aug. 24, 1993, Business Section, at 12 (same). Judging by the surprise expressed by most first year law students upon introduction to the doctrine, I suspect that only a small group of owners has knowledge of the law.

280 Expectancy protection is at the core of Radin's personality approach. *See* Radin, *Property and Personhood*, *supra* note 275. The expectancy protection theme is also reflected in Joseph Singer's reliance approach. *See* Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). Using the assumption of owner acquiescence or abandonment, Singer interprets adverse possession as a means of protecting the expectations of the claimant without undue violence to those of the owner. *Id.* at 665-70. Transposed to the wild lands context, of course, the legitimate expectations of the owner and claimant are reversed from those Singer assumes.

281 *See, e.g.*, Ellickson, *supra* note 7, at 723-25 (discussing libertarian approach); Radin, *Time, Possession and Alienation*, *supra* note 275, at 739-40 (same).

282 *See* Ellickson, *supra* note 7, at 723-25.

eral. Yet the modern arguments advanced in favor of generalized adverse possession, notably by disciples of the law and economics movement, have little application to the special case of wild lands. Analyses based on efficient land utilization, administrative cost minimization and repose all assume the classic paradigm of permanent physical occupancy by the adverse possessor and effective abandonment by the putative owner, a paradigm inconsistent with the vast majority of wild land cases.

1. *Efficient Land Utilization*

Concern for economic efficiency dominates the scant modern scholarship on adverse possession.[283] Richard Posner and others suggest that adverse possession maximizes the combined utility of both the true owner and the claimant by shifting property—whether wild or developed land—to a higher-valued use.[284] This view is essentially a modern reincarnation of the common law policy favoring productive use of land.[285] Yet economic efficiency may be undesirable from an ethical or social standpoint, as its advocates concede.[286] Consider the Posner-inspired fable[287] of the last tree in the world, in which a three person world is entirely developed and thus devoid of all natural tree life, except for one redwood tree owned by *A*. *A* offers to sell the tree either to *B*, a wealthy citizen who plans to chop it into firewood, or *C*, a poor but avid environmentalist who plans to preserve it. *B* would derive moderate pleasure from her planned fires, and offers $2000, a small fraction of her financial worth. *C*, who values preservation of the tree almost as much as her life, offers $1000, her total worth. *A* maximizes utility and promotes efficiency by selling to *B*,

283 *See infra* notes 296-318 and accompanying text discussing two additional efficiency-based objections—litigation costs and the risk of adjudicatory error.

284 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 70 (3d ed. 1986); *see also* COOTER & ULEN, *supra* note 273, at 156 (noting that adverse possession tends to redistribute property to higher-valued uses); Stewart E. Sterk, *Neighbors In American Land Law*, 87 COLUM. L. REV. 55, 61-62 (1987) (arguing that in the context of boundary disputes, particularly in urban areas, the adverse possessor places a higher value on the disputed land than does the record owner); JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 167-68 (1993) (criticizing the analyzes by Cooter, Ulen and Sterk).

285 This theme is occasionally—although rarely—mentioned in modern adverse possession decisions. *See, e.g.*, Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1054 (Alaska 1977) (assuming that society will benefit from making use of idle land); Chaplin v. Sanders, 676 P.2d 431, 435 (Wash. 1984) (stating that adverse possession assures maximum utilization of land).

286 *See* POSNER, *supra* note 284, at 13 (noting that economic analysis does not answer the "ultimate question of whether an efficient allocation of resources would be socially or ethically desirable").

287 This hypothetical is adapted from Posner's well-known tale of two families, one wealthy and the other poor, competing for a limited supply of pituitary extract. *Id.* at 11-12. Consistent with Posner's example, it does not consider the willinguess of third parties to pay.

because willingness to pay serves as the yardstick for economic value. Accordingly, *A* shifts the tree to the higher-valued use of firewood, not the lower-valued use of preservation. The consequent extinction of trees is considered irrelevant. Thus, the pursuit of economic efficiency may require the sacrifice of ends to means.

Even assuming that utility maximization is a legitimate criterion, however, the economic analysis favoring adverse possession fails when applied to wild lands. Consider the argument as formulated by Posner:

> Oliver Wendell Holmes long ago suggested an interesting economic explanation for adverse possession. Over time, a person becomes attached to property that he regards as his own, and the deprivation of the property would be wrenching. Over the same time, a person loses attachment to property which he regards as no longer his own, and the restoration of the property would cause only moderate pleasure. . . . The adverse possessor would experience the deprivation of the property as a diminution in his wealth; the original owner would experience the restoration of the property as an increase in his wealth. If they have the same wealth, then probably their combined utility will be greater if the adverse possessor is allowed to keep the property.[288]

The most striking feature of this passage is the assumption that adverse possession functions when the true owner has in effect abandoned her property; Posner equates non-use with abandonment. This assumption cannot apply to the preservationist owner who, although not using her land, nonetheless continues to enjoy benefit from it and regards it as her own.[289]

If we repeat the analysis, but substitute the preservationist owner for the abandoning owner, Posner's conclusion must be reversed. The rational preservationist owner demonstrably derives value from the very act of preservation.[290] Her willingness to sell is small or nonexistent. She has voluntarily surrendered the opportunity to sell the property at its fair market value. Moreover, she pays the property taxes, assessments and other holding costs necessary to retain title.[291]

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288 *Id.* at 70.

289 *Cf.* Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring in part and dissenting in part) (noting that today "[t]here are many landowners who, though they may not be using their land, have no intention of abandoning it").

290 *Cf.* COOTER & ULEN, *supra* note 273, at 156 (acknowledging that if the original owner "values not using his property more than the adverse possessor values its use, then title should remain with the original owner").

291 The owner who fails to pay property taxes and other similar assessments will ultimately lose his property through a forced sale. *Cf.* Seddon v. Harpster, 403 So. 2d 409, 413 (Fla. 1981) (Boyd, J., concurring in part and dissenting in part) ("It is now much more common for persons to own land without actually possessing it. Now the payment of taxes is presumptively a more reliable indicia of ownership than possession.").

In contrast, the value derived from wild land by the adverse possessor is comparatively small and often speculative. Under the wild lands standard, an adverse claimant can acquire title to property with minimal cost or effort; sporadic, temporary use may suffice. The attachment of the claimant to such property is so slight that severance would normally cause only minor injury, and not the wrenching diminution in wealth that Posner foresees. In Posner's rubric, then, utility is maximized by disallowing adverse possession of wild lands held by a preservationist owner.[292] Accordingly, Posner should logically support the proposed environmental reform of adverse possession.

One simple, objective test distinguishes the preservationist owner from the abandoning owner: payment of property taxes. Local government entities in all states assess property taxes on privately owned land.[293] When an abandoning owner fails to pay his taxes, he burdens his property with a tax lien, which may ultimately result in a forced sale and involuntary transfer of title.[294] The failure to pay such taxes may be considered evidence of abandonment. Conversely, an owner who desires to preserve his land pays his property taxes. Payment of property taxes may be considered objective evidence of continued commitment to preservation. Even in the context of the abandoning owner, then, adverse possession is not necessary to ensure efficient use; abandoned properties are already returned to the market through property taxation.[295]

2. *Minimizing Administrative Costs*

A parallel strand of efficiency analysis defends adverse possession with the antiquated rationale of avoiding stale claims.[296] The primary proponent of this approach is Richard Epstein, who relabels it in eco-

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292 In the most extreme case, application of Posner's analysis to the two-party model (owner v. adverse possessor) might produce a neutral result. Assume that an adverse possessor under color of title has paid fair market value for the disputed property in good faith. Such a claimant would presumably pay property taxes and other holding costs necessary to maintain title. In this instance, both the owner and the adverse possessor might have the same willingness to pay, although one would suspect that the preservationist owner would be less willing to sell. If we consider a multiparty model, however, the balance tilts sharply toward preservation. Because the adverse possessor's willingness to pay is already measured by market value, third parties typically would not be willing to pay anything to shift title to the adverse possessor. Third parties are often willing, however, to pay for the preservation of wild lands. *See supra* notes 259-64 and accompanying text.

293 *See* 5B THOMPSON, *supra* note 6, at 473-78.

294 *Id.* at 495-504.

295 *See, e.g.*, Harrison v. Everett, 308 P.2d 216, 219 (Colo. 1957) (allowing unused 4.1 acre riverside parcel to return to market through tax sale following failure of record owner to pay property taxes; activities of new owner prevented acquisition of property by adjacent landowner through adverse possession).

296 *See* Epstein, *supra* note 7, at 674-82; Ellickson, *supra* note 7, at 725-34; Netter et al., *supra* note 7, at 219-21; COOTER & ULEN, *supra* note 273, at 156.

nomic parlance as the minimization of two categories of administrative costs: litigation costs and the risk of adjudicatory error.[297] For Epstein, the "key value" of adverse possession is preventing dubious cases from being filed at all, thereby sparing the occupant the costs of litigating title.[298] Epstein reasons that after the expiration of the statutory period, the rational prospective plaintiff would consider litigation futile and surrender her claim, leaving the occupying claimant the victor. Moreover, Epstein postulates convincingly that the risk of error in land title litigation increases as time passes because the random loss of evidence over time due to memory loss, witness death and document destruction, "like any other reduction in the quality of evidence, produces a systematic bias for the weaker side."[299] If litigation ultimately does ensue, reliance on adverse possession to establish title presents a comparatively smaller risk of adjudicatory error than does ordinary title litigation founded on record title. While acknowledging that a system founded upon the avoidance of these costs may occasionally protect the guilty,[300] Epstein concludes that this unfortunate result is merely "the inevitable and necessary price paid in discharging the primary function of protecting those with proper title."[301]

The stumbling block in this analysis in the wild lands context is its nineteenth century premise that proof of the adverse possession elements is simple. In effect, Epstein argues that lengthy possession serves as a bright line standard to adjudicate competing title claims. He blindly accepts the limitations model fiction that the adverse possessor maintains "possession" during the period that is truly obvious, notorious and the like.[302] If we accept *arguendo* Epstein's criterion of

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297 *See* Epstein, *supra* note 7, at 674-80. Epstein suggests that comparative utility may also play a limited role. He notes that "the benefit of making the right determination decreases with time, given the way in which it disrupts present expectations of an adverse possessor who may well have improved or developed the land." *Id.* at 676. His analysis, however, proceeds on the assumption that the "benefits of restoring the original owner remain roughly constant over time." *Id.*

298 *Id.* at 677.

299 *Id.* at 676. Epstein analogizes such litigation to a tennis match between two professionals. He notes that while one would normally expect the player with the greater skill to prevail, random elements may eliminate any such skill advantage. For example, if the game is played in an unusual setting (e.g., a junkyard) the player with greater skill may lose her advantage. Thus, Epstein posits that factors such as death or forgetfulness of a witness or destruction of documentation are more likely to harm the party with stronger evidence than the party with weaker evidence, thereby reducing the reliability of delayed title adjudications.

300 Although expressed in the rubric of modern economic theory, Epstein's position mirrors the title protection rationale advocated by English common law theorists centuries ago—the notion that it is preferable to tolerate a few unjust claims in order to insulate most owners from such claims. *See supra* note 10.

301 *See* Epstein, *supra* note 7, at 678.

302 *Id.* at 674-80. This model functions best in the context of urban or suburban boundary line disputes, where the adverse possessor, typically the next door neighbor, has both fenced and landscaped a disputed strip of land. In such a situation, the expiration of

administrative cost minimization[303] and apply it to the wild lands context, his conclusions are flatly wrong. Reliance on record title, the result of the reform proposed by this Article, is preferable to adverse possession for two reasons: flrst, adverse possession law is more likely to encourage needless litigation than a system premised on record title; and second, the risk of error due to the loss of evidence is higher in adverse possession litigation than in litigation based on record title.

a. *Litigation deterrence*

Bright-line standards generally deter litigation. Reasonable parties resolve their dispute informally when they can predict with certainty the result of a potential lawsuit; the certain winner dictates surrender terms to the certain loser. But how bright are the respective lines of the adverse possession standard and the record title standard? The record title standard draws an exceedingly bright line: the holder of record title always prevails. In contrast, adverse possession as applied to wild lands is an indeterminate, murky standard[304] under which results can rarely be predicted with certainty.[305] Consider a tract of wild land owned by *O*, an absentee preservationist owner. Good faith adverse possessor *A* holds color of title and sporadically engages in animal grazing, timber thinning and fishing on the prop-

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the statutory period perpetuates the status quo of actual possession. In the wild lands setting, however, the notion that the adverse possessor has enjoyed this level of "possession" is largely a myth. *See supra* notes 56-86 and accompanying text. In most wild lands cases, the entire common law construct of "possession" is irrelevant; no party actually maintains "possession." Such cases turn instead on disputed proof of occasional activities on the land by each party.

303 Epstein's catalogue of costs is somewhat limited. For example, the record owner who is aware of the adverse possession doctrine would be motivated to monitor the condition of his property carefully; Epstein ignores these monitoring costs. *See supra* notes 215-19 and accompanying text. Ellickson, on the other hand, in attempting to set the optimum period for adverse possession, does consider monitoring costs and other expenses which the record owner, the adverse possessor and third parties might incur. *See* Ellickson, *supra* note 7, at 727-34. As applied to wild lands, however, Ellickson's analysis suffers from the same infirmities that impair the arguments of Posner and Epstein; among other things, Ellickson assumes that both the owner and the adverse possessor place the same subjective value on the property, he iguores the willingness of third parties to pay for preservation and he accepts Epstein's risk of error conclusion.

304 *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (characterizing indeterminate tests as "mud" tests).

305 The volume of litigation created by adverse possession law demonstrates its indeterminate nature. Professor Helmholz, attempting to survey all reported appellate decisions on the subject between 1966 and 1983, observed that decisions were not only abundant, but "over-abundant." *See* Helmholz, *supra* note 4, at 333. Finding over 850 such decisions, he concluded that the law in the area had "failed to achieve the clarity" that one would expect from a "pure possession" standard. *Id. Cf.* SINGER, *supra* note 284, at 166 (observing, although not in the wild lands context, that existing adverse possession law does not appear to deter litigation). Even Professor Cunningham, a staunch supporter of the limitations model, concedes that adverse possession cases normally present "difficult factual questions." Cunningham, *supra* note 4, at 61.

erty, but *O* receives no notice of these acts. After the ten year statutory period for adverse possession elapses, neither party is in "possession" of the property in the traditional common law sense of the word. Assume that each now learns of the other and consults counsel for advice. In all probability, counsel would advise each that under the wild lands standard, the result of potential litigation is uncertain. Moreover, because neither party holds actual possession in the sense Epstein envisions, neither can safely assume that the other has surrendered her claim absent either an agreement or a judgment.

O will encounter both factual and legal uncertainty in gauging her prospects for success. *O* may well consider *A*'s factual claims incredible in light of her personal observations over the relevant statutory period; *O* will be inclined to rely on her own testimony to rebut them.[306] *O* may also rely on her personal activities to preclude the required exclusivity element. Because title may hinge on the respective credibility of the parties, *O* may have a reasonable possibility of success. Legally, the vagueness of the wild lands standard, which assesses the necessary elements of an adverse possession claim by the nature and location of the land itself,[307] may give *O* ample latitude to challenge either the quality or quantity of *A*'s actions. Therefore, *O* is more likely to sue than surrender. *A*, engaging in the same analysis, will likely reach a similar result. If *O* elects inaction, the consequent stalemate will probably motivate *A* to sue. *A* will be unable as a practical matter to realize the economic value of the property absent either a judgment or settlement. For example, because *O* holds record title, *A* will have difficulty encumbering, leasing or selling the land.[308] Similarly, *A* faces the danger that *O* herself may encumber, lease or sell the property to a third party acting in good faith, whose bona fide interest would eliminate *A*'s claim. Additionally, because *A* does not actually occupy the land, an inspecting third party would not discover her interest.

b. *Risk of adjudicatory error*

Epstein also defends adverse possession with the assertion that it minimizes judicial error in determining title, apparently when com-

306 This represents the response of the typical owner. *See, e.g.*, Klingel v. Kehrer, 401 N.E.2d 560, 563 (Ill. App. Ct. 1980) (discussing owner's testimony that he had seen no evidence of adverse possessor's claimed tree cutting activities on property).

307 *See supra* notes 53-85 and accompanying text.

308 Most states follow the rule that title acquired by adverse possession, if clearly established, is marketable. *See, e.g.*, Conklin v. Davi, 388 A.2d 598, 601 (N.J. 1978) (discussing the majority rule); W.E. Shipley, Annotation, *Title By or Through Adverse Possession as Marketable*, 46 A.L.R.2D 544 (1956) (collecting cases). It is rarely possible to "clearly" establish title to wild lands based on adverse possession without litigation, however, because extensive factual conflicts are the norm and the legal standard is indeterminate. *See infra* notes 310-15 and accompanying text.

pared to a record title system.[309] This argument had merit 300 years ago in an England that lacked a centralized land record system; it may also have had merit 150 years ago in the uncivilized fringe of the American frontier; but it has no merit today in the wild lands context. Accepting Epstein's postulate that delay causes random loss of evidence, adverse possession presents a far greater risk of adjudicatory error in wild land cases than would the pure record title system that would result from adverse possession reform.

Assume, for example, that the hypothetical suit between *O* and *A* goes to trial. Epstein's implicit belief that the adverse possessor will easily prove actual, lengthy occupancy is an illusion. The case hinges primarily on oral testimony from *O*, *A* and other individuals regarding the nature and duration of erratic activities on the land during the statutory period—the type of evidence most susceptible to Epstein's random loss of evidence analysis. With the passage of time, some potential witnesses may have died; at a minimum, the memories of those still living will have faded.[310] Additionally, the memories of *O* and *A* may be subconsciously selective, remembering the helpful and forgetting the harmful.[311]

The vagueness and unreliability of evidence in wild lands cases on questions such as the extent, frequency and location of claimed activities has plagued the courts.[312] In one case, for example, the court heard completely contradictory testimony from the owner and the adverse possessor on the issue of timber cutting.[313] The owner testified that although he had periodically cut pecan trees on the land for

309 Epstein, *supra* note 7, at 678-79; *see also* Merrill, *supra* note 12, at 1128 (somewhat half-heartedly defending adverse possession on a stale evidence rationale).

310 *See, e.g.*, Melliere v. Kaufmann, 236 N.E.2d 147, 150 (Ill. App. Ct. 1968) (denying an adverse possession claim to 24 wetland acres where the "one witness who seemed to be familiar with the location and use" of the property was testifying about events dating from 1915, when he "was only 4 or 5 years of age").

311 Studies repeatedly show that observers exposed to the same event remember it differently. *See generally* JAMES W. JEANS, TRIAL ADVOCACY 306-07 (1975) (explaining an experiment that demonstrates this phenomenon). Thus, the honest recollections of witnesses may differ, particularly as to events from the distant past. Moreover, witnesses tend to recall events in a manner that favors the party with whom they identify, apparently due to subliminal subjective attitudes. *Id.*

312 *See, e.g.*, Cagle v. Valter, 170 N.E.2d 593, 595 (Ill. 1960) (remarking that evidence of possessory acts was "at best vague and speculative"); Bone v. Loggins, 652 S.W.2d 758, 760 (Tenn. Ct. App. 1982) (rejecting adverse possession claim to remote 300 acre forest tract based on wood cutting and noting that "[t]he proof does not clearly establish the extent of the cutting, how much and how often wood was cut, and over what portion of the tract the wood was cut"); Calhoun v. Woods, 431 S.E.2d 285, 288 (Va. 1993) (rejecting claim to 145.5 acres of "unimproved mountain land" and commenting that "the record is unclear precisely to what extent and during what period of time the disputed property actually was used"); *cf.* Knecht v. Spake, 346 P.2d 98, 101 (Or. 1959) (noting that evidence of adverse possession in the case was "somewhat fragmentary, as it usually is after 20 or 25 years").

313 *See* Klingel v. Kehrer, 401 N.E.2d 560, 564 (Ill. Ct. App. 1980).

years, he had never seen evidence of tree cutting there by the adverse possessor.[314] The adverse claimant testified that although he had sometimes cut pecan trees there, he had never seen any stumps or other evidence of such cutting by the owner.[315]

In contrast, the risk of error caused by random loss of evidence in a pure record title system is minor. If *O* and *A* need only litigate the issue of record title, the necessary evidence will consist primarily of deeds and other title documents. The danger that such evidence will be destroyed or misplaced is comparatively slight. Furthermore, concern for missing or forgetful witnesses is reduced because oral testimony holds only secondary importance in a quiet title action.

Thus, as a means of ascertaining title, adverse possession of wild lands is at best an anachronism, and at worst an absurdity. In the bygone era of unrecorded land titles and crude surveys, actual occupancy was clear—and perhaps optimum—proof of ownership.[316] Times have changed. The technology of the twentieth century far surpasses that of the feudal age; modern land records are efficiently maintained, increasingly computerized[317] and provide a much more accurate method for determining title.[318]

3. *Repose and the Adverse Possessor*

Adverse possession has also been justified on the ground that it provides repose for the adverse claimant, regardless of the nature of the land involved.[319] This proposition lacks logical force when applied to the bad faith adverse possessor: her intentionally wrongful conduct should not entitle her to the reward of title. But what about

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314 *Id.*

315 *Id.* at 563.

316 *See supra* notes 23-26 and accompanying text; *see also* Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 6 (Pa. 1988) (McDermott, J., dissenting) (noting that adverse possession stems from an era of unrecorded land titles, whereas "[i]n a modern organized state all titles are recorded").

317 *See generally* 7 POWELL, *supra* note 5, ¶¶ 904-06 (discussing the history and mechanics of the land recording system).

318 *See* Seddon v. Harpster, 403 So. 2d 409, 414 (Fla. 1981) (Boyd, J., concurring in part and dissenting in part) ("With modern technology and computerized transactions our society is now more capable of accurately establishing legal interest to property through paper title than through possession."); *cf.* SINGER, *supra* note 284, at 166 (noting, though not in the wild lands context, that record title is a more efficient standard than adverse possession).

319 *See* Warsaw v. Chicago Metallic Ceilings, Inc., 676 P.2d 584, 590 (Cal. 1984); Gibson v. State Land Comm'r, 374 So. 2d 212, 215-16 (Miss. 1979); Republic Nat'l Bank of Dallas v. Stetson, 390 S.W.2d 257, 262 (Tex. 1965); *see also* CALLAHAN, *supra* note 5, at 86-88 (discussing the view that the statutes of limitations are statutes of repose).

the most sympathetic case[320]—the good faith[321] adverse possessor with color of title?[322] Concern for this claimant is tempered by three factors: a weak connection to the land, relative inferiority of title and alternative compensation sources.

First, repose has little significance in wild lands cases. In the classic adverse possession case, the claimant actually occupies the property through residence, improvement, cultivation or other extensive activities and structures her affairs on the assumption that her right to the property will be protected. To deny adverse possession would disrupt this established order.[323] In contrast, the claimant's possessory activities in the wild lands context are usually limited in scope and isolated in time; activities such as firewood gathering, hunting, grazing and cutting timber are commonplace. These acts differ fundamentally in both quality and quantity from those of the classic adverse possessor who has resided upon and intensively used the same land for years. The link between the claimant and the property is normally weak. To paraphrase Oliver Wendell Holmes, the roots of the claimant in the land can be displaced without injury.[324]

Second, the claimant's inferior title status must be weighed in the balance. Each claimant relying on adverse possession law under color of title is, by definition, a claimant whose record title is legally defective. Perhaps she purchased first but failed to timely record her deed, thus allowing a later buyer to don the mantle of the good faith purchaser. Perhaps her agents failed to conduct an adequate title search before purchase, overlooking the recorded interest of the true owner. In any event, the claimant's inferior title is the product of an error attributed to her by law, in the sense that she had a better opportunity

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320 The intermediate case concerns the good faith adverse possessor under a claim of right. Because such a claimant lacks a deed or other color of title, the reasonableness of his good faith is often questionable. My analysis in the text of the more sympathetic case of the good faith adverse possessor with color of title will generally encompass this intermediate case as well.

321 I assume that the good faith of the adverse possessor has been proven. Proof of scienter, however, is admittedly difficult. As the court in *Tioga Coal Co. v. Supermarkets Gen. Corp.* acknowledged, "[D]iscerning the mental state of an adverse possessor is, at best . . . guesswork; and at worst, impossible." 546 A.2d 1, 4 (Pa. 1988).

322 Scholars debate the extent to which adverse possession hinges on the good faith expectations of the claimant. *Compare* Helmholz, *supra* note 4 (arguing that courts manipulate the adverse possession doctrine to protect the good faith claimant) *with* Cunningham, *supra* note 4 (arguing that good faith is largely irrelevant). For a proposal to create a two tier system which would reqnire bad faith claimants to compensate the record owner but allow good faith claimants to acquire title without such payment, see Merrill, *supra* note 12, at 1145-53.

323 *See supra* notes 42-43 and accompanying text.

324 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897); *see also* Tioga Coal Co. v. Supermarkets Gen. Corp., 546 A.2d 1, 5 (Pa. 1988) (interpreting a similar sentiment expressed by Holmes in a letter to William James).

to prevent such error than did the innocent record owner.[325] Her assumed good faith reliance, then, is legally unreasonable.

Third, the disappointed claimant may be entitled to compensation from other parties, including sellers, title insurance companies, attorneys, real estate brokers and surveyors.[326] Ironically, the adverse possessor who installs physical improvements on wild land, interfering with the goal of the preservationist owner, may even be entitled as a good faith improver to compensation from the owner.[327] Because the adverse possessor normally values the property in economic terms, a damages remedy would afford adequate relief. In contrast, if the preservationist owner forfeits title to the adverse claimant, she cannot pursue a claim for damages.[328] Even if a damages remedy were available, it could not adequately compensate the owner whose goal is environmental protection and not economic gain.

A parallel argument extends the umbrella of repose beyond the adverse claimant to encompass third parties who rely in good faith upon the claimant's apparent entitlement.[329] According to this argument, the third party who contracts to purchase the property or extends credit based on the aura of ownership conferred by possession merits protection. Third parties contemplating a substantial transaction involving the property, however, typically will conduct a title search, and thereby discover the true status of record title. Moreover, in the context of adverse possession of wild lands, the claimant generally lacks any aura of ownership. The claimant typically does not occupy the property, but relies on minor, sporadic actions, which do not

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325 Although her title claim is not necessarily void, or even defective, it is inferior *relative to that of the record owner.*

326 The passage of time, however, may render many of these claims worthless. For example, the appropriate statute of limitations may have lapsed during the adverse possession period, or the culpable defendants may have vanished, died or become insolvent.

327 Most states provide by statute that the good faith improver may recover compensation from the true owner, although such compensation is frequently limited by the amount by which the fair market value of the property has been increased. *See, e.g.*, CAL. CIV. PRO. CODE §§ 871.1-871.7 (West 1987 & Supp. 1993) (providing for compensation to good faith improvers). The application of this rule to undeveloped lands effectively requires the preservationist owner to pay for environmental destruction. That the claimant is deemed an "improver" under such circumstances is unsurprising, because most such statutes were adopted in the nineteenth century expressly for the purpose of encouraging land settlement. *See generally* HORWITZ, *supra* note 125, at 61-62 (discussing the origin of good faith improver statutes). *But cf.* Gilardi v. Hallam, 636 P.2d 588, 593 (Cal. 1981) (rejecting the argument that the enactment of good faith improver statutes serve as evidence of legislative intent to modify adverse possession).

328 *But see* Merrill, *supra* note 12, at 1145-53 (suggesting that the successful bad faith adverse possessor should at least be required to compensate the true owner for the fair market value of the affected property); Noel Elfant, Comment, *Compensation for the Involuntary Transfer of Property Between Private Parties: Application of a Liability Rule to the Law of Adverse Possession*, 79 NW. U. L. REV. 758, 774-78 (1984) (arguing that the adverse possessor should compensate the record owner under some circumstances).

329 *See, e.g.*, Merrill, *supra* note 12, at 1132.

create the appearance of ownership. Consequently, concern for third party repose need not extend to wild lands.[330]

CONCLUSION

Behind a neutral façade, American adverse possession law is fundamentally hostile to the private preservation of wild lands. Courts have maintained the form of the limitations model while shifting to the substance of the development model. Reflecting the influence of the development model, modern adverse possession law facilitates economic exploitation of wild lands at the expense of environmental protection. The apparent incoherence of adverse possession theory stems in part from the failure to recognize the dominance of the development model and the decline of the limitations model.

A critical examination of the wild lands branch of adverse possession demonstrates the importance of reform. The need to encourage economic exploitation of sparsely settled regions, and thus the principal rationale for the development model, ended long ago. Moreover, sweeping generalizations by commentators explaining the purpose and operation of adverse possession in the abstract have little explanatory force in the special context of wild lands. The twenty-first century need not blindly endorse the exploitative ideology of the past. Adverse possession of wild lands should be consigned to the dustbin of legal history as an idea whose time has passed.

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330 An additional consideration is the extent to which the proposed reform might undercut the democratic values inherent in the land use planning process. Zoning and other land use decisions are ultimately made by local elected officials, such as city council members and county commissioners. *See generally* 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW ¶¶ 1.01-1.04 (1988 Rev.) (providing an overview of the local land use planning process). These decisions typically follow public hearings that provide the opportunity for community debate on issues including the location, timing and nature of future development (and by implication preservation) in the region. A city council planning for future growth, for example, might decide to rezone *O*'s 1000 acre grassland tract on the edge of town from an agricultural zone to a new zone which allowed residential use. This decision may be viewed as a community consensus on the most appropriate use for *O*'s property.

Suppose that *O* ignored this consensus and instead opted to preserve her property in its natural condition. If *O*'s land is vulnerable to adverse possession, as under current law, an industrious adverse claimant might acquire title and develop the land, thus advancing majoritarian interests. In this way, adverse possession may sometimes serve as a mechanism to avoid preservation decisions that the democratic process deems unwise. By eliminating adverse possession of wild lands, the proposed reform might in some instances perpetuate preservation decisions contrary to majority will. *Cf.* Korngold, *supra* note 226, at 459 (discussing democratic concerns in the context of conservation easements).

Two factors neutralize this potential concern. First, adverse possession is a double-edged sword in this context, endangering all preservation decisions, even those which implement majority will. Second, the state is not powerless when confronted with an inappropriate preservation decision; it can typically condemn such land under its eminent domain power and return it to the market.